A TREATISE

ON THE

LAW OF RECEIVERS.

BY

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PREFACE.

The growth of the law of receivers during the ten years which have elapsed since the publication of the first edition of this work has been very marked. Six hundred new cases, which have been reported in the English, Irish and American reports during that time, are embodied in this edition. The principal additions have been to the chapters upon Actions by and against Receivers, Receivers Over Corporations, Railways, Real Property and Mortgages, especially to the chapter upon Railways. The law of receivers over railways has been largely the growth of the last ten years, and it can not be said to have wholly emerged from its formative period, and considerable modifications of existing doctrines may yet be expected. This chapter has been entirely rewritten and much enlarged, presenting several topics which are wholly new, including Preferred Indebtedness of Railway Receivers, Actions against the Receiver and Receivers' Certificates. Considerable freedom has been indulged in the criticism of doubtful authorities, but the author has scrupulously endeavored to present the existing state of the law upon the topics under discussion.

J. L. H.

CHICAGO, March, 1886.

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THE LAW OF RECEIVERS.

CHAPTER I.

OF THE GENERAL FEATURES OF THE JURISDICTION.

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§ 1. A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it.[1] He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest.[2] Being an officer of the court,

[1] Booth *v.* Clark, 17 How., 322; Waters *v.* Carroll, 9 Yerg., 102; Baker *v.* Administrator of Backus, 32 Ill., 79; Devendorf *v.* Dickinson, 21 How. Pr., 275.

[2] Davis *v.* Duke of Marlborough, 2 Swans., 108; Booth *v.* Clark, 17 How., 322; Hooper *v.* Winston, 24 Ill., 353; Baker *v.* Administrator of Backus, 32 Ill., 79; Kaiser *v.* Kellar, 21 Iowa, 95; King *v.* Cutts, 24 Wis., 627; Osborn *v.* Heyer, 2 Paige, 342; Curtis *v.* Leavitt, 1 Ab. Pr., 274; Brown *v.* Northrop, 15 Ab. Pr., N. S., 333; Corey *v.* Long, 43 How. Pr., 497; S. C., 12 Ab. Pr., N. S., 427; Williamson *v.* Wilson, 1 Bland, 418; Ellicott *v.* Warford, 4 Md., 80; Van Rensselaer *v.* Emery, 9 How. Pr., 135; Meier *v.* Kansas Pacific R. Co., 5 Dill., 476. But in Louisiana it is held that a receiver of partnership funds, appointed by consent of both partners, pending a suit for the dissolution of the firm, is not an officer of the

the fund or property entrusted to his care is regarded as being *in custodia legis*, for the benefit of whoever may eventually establish title thereto, the court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity.[1]

§ 2. A receiver is frequently spoken of as the "hand of the court," and the expression very aptly designates his functions, as well as the relation which he sustains to the court.[2] He is regarded as the executive officer of a court of chancery in much the same sense that a sheriff is the executive officer of a court of law, and the assets and property in his hands are as much in the custody of the law as if levied upon under an execution or attachment. Indeed, the purpose for which a receiver takes possession is closely allied to that of a sheriff in levying under execution, except

court, but merely an agent of the parties, and that the principles governing receivers generally are inapplicable to such a case. Kellar *v.* Williams, 3 Rob. (La.), 321.

[1] Booth *v.* Clark, 17 How., 322; Hunt *v.* Wolfe, 2 Daly, 303; Devendorf *v.* Dickinson, 21 How. Pr., 275; Corey *v.* Long, 43 How. Pr., 497; S. C., 12 Ab. Pr., N. S., 427; Skinner *v.* Maxwell, 66 N. C., 45, and see S. C., 68 N. C., 400; Battle *v.* Davis, 66 N. C., 252; Hooper *v.* Winston, 24 Ill., 353; Kaiser *v.* Kellar, 21 Iowa, 95; Ellicott *v.* Warford, 4 Md., 80; Coburn *v.* Ames, 57 Cal., 201.

[2] See Runyon *v.* Farmers' & Mechanics' Bank of New Brunswick, 3 Green Ch., 480; Van Rensselaer *v.* Emery, 9 How. Pr., 135; Williamson *v.* Wilson, 1 Bland, 418; Ellicott *v.* Warford, 4 Md., 80. "The appointment of a receiver," observes Mr. Justice Eccleston, in Ellicott *v.* Warford, 4 Md., 85, "does not determine any right, or affect the title of either party, in any manner whatever. He is the officer of the court, and truly the hand of the court. His holding is the holding of the court from him from whom the possession was taken. He is appointed on behalf of all parties, and not of the plaintiff or of one defendant only. His appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it." And see Williamson *v.* Wilson, 1 Bland, 418, for a learned and exhaustive discussion of the general principles governing the jurisdiction of equity by the appointment of receivers.

that the scope of the receiver's authority is more comprehensive, since he is usually required to pay all demands upon the fund in his hands to the extent of that fund; while a sheriff is only obliged to make payment of the debt mentioned in the execution out of the property levied upon.[1] And it has been held that the appointment of a receiver is, in effect, an equitable execution.[2]

§ 3. The jurisdiction exercised by courts of equity in administering relief by the extraordinary remedy of a receiver *pendente lite*, is a branch of their general preventive jurisdiction, being intended to prevent injury to the thing in controversy, and to preserve it for the security of all parties in interest, to be disposed of as the court may finally direct.[3] The power is justly regarded as one of a very high nature, and not to be exercised where it would be productive of serious injustice or injury to private rights.[4] The exercise of the extraordinary power of a chancellor in appointing receivers, as in granting writs of injunction or *ne exeat*, is an exceedingly delicate and responsible duty, to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief.[5] Indeed, the appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform.[6] It is a peremptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties.[7] It is, therefore, not to be exercised doubtingly, but the court must be convinced that the relief is needful, and that it is the appropriate

[1] *In re* Merchants' Insurance Co., 3 Biss., 162.

[2] Hunt *v.* Wolfe, 2 Daly, 303.

[3] Mays *v.* Rose, Freem. (Miss.), 703.

[4] Opinion of Frick, J., in Speights *v.* Peters, 9 Gill, 476.

[5] Crawford *v.* Ross, 39 Ga., 44; Furlong *v.* Edwards, 3 Md., 112; Latham *v.* Chafee, 7 Fed. Rep., 525. See, also, Beverley *v.* Brooke, 4 Grat., 187.

[6] Drummond, J., in Bill *v.* New Albany, etc., R. Co., 2 Biss., 390.

[7] Whitehead *v.* Wooten, 43 Miss., 523.

means of securing an appropriate end.[1] And since it is a serious interference with the rights of the citizen, without the verdict of a jury and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury.[2] And because it divests the owner of property of its possession before a final hearing, it is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss.[3]

§ 4. The power exercised by courts of equity in the appointment of receivers is invoked upon many occasions with great advantage to the parties. It is especially beneficial when there is danger that the subject-matter in controversy may be wasted, destroyed, injured or removed during the progress of the litigation, the object of the relief being to secure the fund for the person who may ultimately be found entitled thereto, with as little prejudice as possible to any of those concerned.[4] And a receivership is

[1] Chicago & Allegheny Oil & Mining Co. *v.* United States Petroleum Co., 57 Pa. St., 83; S. C., 6 Philad., 521.

[2] Crawford *v.* Ross, 39 Ga., 44. And the court say: "The high prerogative act of taking property out of the hands of one, and putting it in pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong, imminently impending."

[3] Pullan *v.* Cincinnati & Chicago R. Co., 4 Biss., 47.

[4] Lenox *v.* Notrebe, Hemp., 225. "The application for a receiver," says Mr. Justice Clayton, "is addressed to the sound discretion of the court, regulated by legal principles, and is exercised by the courts upon many occasions with great benefit to the parties. It is particularly serviceable when there is danger that the subject-matter of controversy may be wasted or destroyed, impaired, injured or removed during the progress of the suit. The object is to secure the fund for the party found, upon final hearing, to be entitled, and to produce as little prejudice as possible to any of those concerned. When one party has a clear right to the possession of property, and when the dispute is as to the title only, the court would very reluctantly disturb that possession. But when the property is exposed to danger and to loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interpose and to have it secured." See, also, Tregaskis *v.* Judge of Superior Court, 47 Mich., 509.

one of those remedial agencies originally devised to preserve the fund or thing in controversy from removal beyond the jurisdiction, or from spoliation, waste or deterioration *pendente lite*, to the end that it may be appropriated as the final decree shall direct.[1] A court of equity, by its order appointing a receiver, takes the entire subject-matter of the litigation out of the control of the parties and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding. And the receiver's possession being the possession of the court appointing him, any attempt to disturb such possession without leave of the court may be treated as a contempt of court, and punished accordingly.[2]

§ 5. A receiver being appointed for the preservation of the fund or property *pendente lite*, and for its ultimate disposal according to the rights and priorities of the parties entitled, the remedy is regarded as in the nature of a sequestration rather than as an attachment of the property, and it ordinarily gives no advantage or priority to the person at whose instance the appointment is made, over other parties in interest.[3] Nor does it change the title to or create any lien upon the property; its purpose in this respect being rather like that of an injunction *pendente lite*, to preserve the subject-matter until the rights of all parties may be judicially determined.[4] And in the exercise of this branch of its extraordinary jurisdiction, equity reverses the ordinary course of administering justice, and levies upon the property a kind of equitable execution, by means of which it makes a general appropriation thereof, leaving the question of who may finally be entitled to be determined thereafter. It follows, therefore, from the peculiar nature of the remedy as thus shown, as well as from the fact that the

[1] Myers *v.* Estell, 48 Miss., 401.

[2] Beverley *v.* Brooke, 4 Grat., 211.

[3] Beverley *v.* Brooke, 4 Grat., 187; Ellis *v.* Boston, Hartford & Erie R. Co., 107 Mass., 1.

[4] Ellis *v.* Boston, Hartford & Erie R. Co., 107 Mass., 1. See, also, *Ex parte* Dunn, 8 S. C., 207.

court must often act before the merits of the controversy have been fully developed, and when the parties in interest are not all before the court, that it proceeds with extreme caution, in order to avoid any unnecessary disturbance of legal rights or equitable priorities.[1]

§ 6. It necessarily follows from the nature of the jurisdiction as thus far disclosed, as well as from the purpose and object usually had in view in the appointment of a receiver *pendente lite*, that the remedy is a provisional or aux-

[1] Beverley *v.* Brooke, 4 Grat., 187. The nature and functions of this extraordinary jurisdiction of courts of equity are very clearly stated in the opinion of the court in this case, by Baldwin, J., as follows, p. 208: "By means of the appointment of a receiver, a court of equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled, whether regular parties in the cause, or only parties in interest coming before the court in a seasonable time, and due course of proceeding, to assert and establish their pretensions. The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection. The order of appointment is in the nature, not of an attachment, but a sequestration; it gives in itself no advantage to the party applying for it over other claimants; and operates prospectively upon rents and profits, which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in or to the principal subject out of which those rents and profits issue. In the exercise of this summary jurisdiction, a court of equity reverses, in a great measure, its ordinary course of administering justice; beginning at the end, and levying upon the property a kind of equitable execution, by which it makes a general instead of a specific appropriation of the issues and profits, and afterwards determining who is entitled to the benefit of its *quasi* process. But acting, as it often must of necessity, before the merits of the cause have been fully developed, and not unfrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously legal rights and equitable priorities."

iliary one, invoked as an adjunct or aid to the principal relief sought by the action, and not always or necessarily the ultimate object of that action. The application for a receiver may succeed or fail, and yet in no manner affect the principal controversy or determine the final result.[1] And in this respect the appointment of a receiver *in limine* bears no closer relation to the action in which this extraordinary relief is sought, than an attachment in aid of an action upon a promissory note bears to such action.[2] The appointment of a receiver *in limine,* therefore, like the granting of a preliminary or interlocutory injunction, is not an ultimate determination of the right or title, and the court, in passing upon the application, in no manner decides the questions of right involved, nor anticipates its final decision upon the merits of the controversy; the leading idea upon the preliminary application being merely to husband the property or fund in litigation for the benefit of whoever may be determined in the end to be entitled thereto.[3] The decision upon the application for a receiver *pendente lite* is, therefore, without prejudice to the final decree which the court may be called upon to make, and the court expresses no opinion as to the ultimate questions of right involved. And if the plaintiff presents a *prima facie* case, showing an apparent right or title to the thing in controversy, and that there is imminent danger of loss without the intervention of the court, the relief may be granted without going further into the merits upon the preliminary ap-

[1] Hottenstein *v.* Conrad, 9 Kan., 435; Cooke *v.* Gwyn, 3 Atk., 689. See, also, Mays *v.* Rose, Freem. (Miss.), 703; Chicago and Allegheny Oil and Mining Co. *v.* United States Petroleum Co., 57 Pa. St., 83; S. C., 6 Philad., 521; Fellows *v.* Heermans, 13 Ab. Pr., N. S., 1; McCarthy *v.* Peake, 18 How. Pr., 138; S. C., 9 Ab. Pr., 164.

[2] Hottenstein *v.* Conrad, 9 Kan., 435.

[3] Huguenin *v.* Baseley, 13 Ves., 105; Cooke *v.* Gwyn, 3 Atk., 689; Ellicott *v.* Warford, 4 Md., 80; Blakeney *v.* Dufaur, 15 Beav., 40; Leavitt *v.* Yates, 4 Edw. Ch., 162; Brown *v.* Northrup, 15 Ab. Pr., N. S., 333; *Ex parte* Walker, 25 Ala., 104; Bitting *v.* Ten Eyck, 85 Ind., 357.

plication.[1] Indeed, upon an interlocutory application for a receiver, a court of equity usually confines itself strictly to the point which it is called upon to decide, and will not go into the merits of the case at large, since the court is bound to express its opinion only to the extent necessary to show the grounds upon which it disposes of the application.[2]

§ 7. The appointment of a receiver *pendente lite*, like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case.[3] And where the court is unable to see that any benefit will result from appointing a receiver in the cause, or that any injury

[1] Leavitt *v.* Yates, 4 Edw. Ch., 162; Brown *v.* Northrup, 15 Ab. Pr., N. S., 333. Leavitt *v.* Yates was a bill to set aside a deed of trust transferring certain securities, and a motion upon bill and answers for an injunction and for a receiver to take charge of the securities *pendente lite*. McCoun, Vice Chancellor, observes: "The argument has embraced all the points which the pleadings are calculated to present when the cause shall be brought to a hearing for a final decree; but it does not follow that a decisive opinion is to be expressed in this stage of the cause upon the rights of all the parties; for, whatever may be the result of a motion of this kind, the general understanding is that it is without prejudice to the ultimate decision which the court may be called upon to make. Insolvency and danger to the fund pending the litigation, with a *prima facie* case and probable cause for sustaining the bill, are or ought to be sufficient in the first instance to found an injunction and a receivership upon, without going minutely into the merits. My own observation has taught me that, in general, it is most prudent and best promotes the ends of justice to go no further upon the motion."

[2] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162. See, also, Conro *v.* Gray, 4 How. Pr., 166.

[3] Owen *v.* Homan, 3 Mac. & G., 378, affirmed on appeal to the House of Lords, 4 H. L. Rep., 997; Hamburgh Manufacturing Co. *v.* Edsall, 4 Halst. Ch., 141; Chicago and Allegheny Oil and Mining Co. *v.* United States Petroleum Co., 57 Pa. St., 83; S. C., 6 Philad., 521; Pullan *v.* Cincinnati & Chicago R. Co., 4 Biss., 47; Crane *v.* McCoy, 1 Bond, 422; Mays *v.* Rose, Freem. (Miss.), 703; Greville *v.* Fleming, 2 Jo. & Lat., 335; Morrison *v.* Buckner, Hemp., 442; Whelpley *v.* Erie Railway Co., 6 Blatchf., 271; Hanna *v.* Hanna, 89 N. C., 68; Williamson's Adm'r *v.* W. C. V. M. & G. S. R. Co., 33 Grat., 624.

will follow from refusing the relief, it will not interfere, especially if it is apparent that great confusion and difficulty in the management of the property may result to both parties from a receivership.[1] So if, upon a consideration of all the circumstances of the case, it is apparent that greater injury will ensue from appointing a receiver than from leaving the property in its present possession, or if other considerations of propriety or of convenience render the appointment improper or inexpedient, the court will refuse to interfere.[2] Nor will a receiver be appointed in an improper case, even by consent of the parties, especially when the rights of third persons are concerned and may be jeopardized by the appointment.[3] And he who seeks the appointment of a receiver must himself come into court with clean hands.[4]

§ 8. While it has already been shown that the court, in passing upon the application for a receiver, in no manner forestalls or anticipates the final decision upon the merits, the probability that plaintiff will ultimately be entitled to a decree in his action is still a material element to be considered by the court. And when upon the entire record this is a matter of much doubt, the court is justified, in its discretion, in refusing a receiver.[5]

[1] Hamburgh Manufacturing Co. *v.* Edsall, 4 Halst. Ch., 141.

[2] Vose *v.* Reed, 1 Woods, 647.

[3] Whelpley *v.* Erie Railway Co., 6 Blatchf., 271.

[4] Hyde Park Gas Co. *v.* Kerber, 5 Bradw., 132.

[5] Owen *v.* Homan, 3 Mac. & G., 378, affirmed on appeal to the House of Lords, 4 H. L. Rep., 997; Wilkinson *v.* Dobbie, 12 Blatchf., 298. In Owen *v.* Homan, 3 Mac. & G., 378, Lord Truro observes, p. 411, as follows: "I am of opinion that the case upon the whole record presents too much doubt as to the plaintiff's right to a decree to warrant the possession of the property being disturbed. It is unnecessary to do more than to state that the granting a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case; one most material of which circumstances is the probability of the plaintiff being ultimately entitled to a decree. In this case many of the important points arise upon the construction of the deeds, and not upon disputed facts; and I repeat that in my opinion that construction is attended with too much doubt and difficulty to entitle the plaintiff to a receiver."

§ 9. The power of appointing receivers is necessarily inherent in courts possessed of equitable jurisdiction, and may be invoked whenever there is an estate or fund in existence and no competent person entitled to hold it, or when the person entitled occupies the relation of a trustee and is misusing or misapplying the property. And when property constituting the subject-matter of the litigation is subject to clear equities in favor of a party to the action who is out of possession, the court may appoint a receiver when the relief seems to be just and necessary to preserve the thing in dispute from the control of either party until the controversy is determined.[1] So a receiver will be appointed for the protection of the fund when plaintiff has an equitable interest, and defendant having possession of the property is wasting it, or removing it beyond the jurisdiction of the court.[2] And if the order does not in terms fix or limit the duration of the receivership, it will be construed as continuing during the pendency of the suit, unless the receiver is sooner discharged.[3] But to warrant a court of equity in incurring the expense of a receivership, it must clearly appear that there is actual property in existence which ought to be protected, and the courts are averse to interfering when the property is of trifling value.[4]

§ 10. A receiver being appointed by a court of equity in the exercise of its extraordinary jurisdiction, applications for the relief are governed by many of the principles which control the courts in administering the extraordinary remedy of an injunction. And as it is always a sufficient objection to the granting of an injunction, that the person aggrieved has a full and adequate remedy at law,[5] so courts of equity will not lend their aid by the appointment of receivers where

[1] Skinner v. Maxwell, 66 N. C., 45; Flagler v. Blunt, 32 N. J. Eq., 518.

[2] Vose v. Reed, 1 Woods, 647.

[3] Weems v. Lathrop, 42 Tex., 207.

[4] Whitworth v. Whyddon, 2 Mac. & G., 52.

[5] Coughron v. Swift, 18 Ill., 414; Winkler v. Winkler, 40 Ill., 179; Poage v. Bell, 3 Rand., 586; Webster v. Couch, 6 Rand., 519; Mullen v. Jennings, 1 Stockt., 192; Wooden v. Wooden, 2 Green Ch., 429; Sherman v. Clark, 4 Nev., 138.

the persons seeking the relief have ample redress by the usual course of proceedings at law, or where the law affords any other safe or expedient remedy.[1] Thus, where proceedings are instituted by a creditor of a banking corporation for the appointment of a receiver to wind up its affairs, but it is apparent from his bill that whatever rights he may have are cognizable at law and may be remedied by following the course prescribed by law for that purpose, the application will be denied and the plaintiff will be left to pursue his legal remedy.[2] Nor does it necessarily follow, because the remedy at law is attended with difficulty, that plaintiff may have relief in equity by a receiver.[3] So where the person aggrieved, having a remedy at law, loses that remedy by his own laches, he can not come into equity and have a receiver.[4] And there is no case in which a court of equity appoints a receiver simply because it will be productive of no harm.[5]

§ 11. The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite*, are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed, the element of danger being an important consideration in the case.[6] And a remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury.[7] The power

[1] Sollory *v.* Leaver, L. R., 9 Eq., 22; Cremen *v.* Hawkes, 2 Jo. & Lat., 674; Parmly *v.* Tenth Ward Bank, 3 Edw. Ch., 395; Corey *v.* Long, 43 How. Pr., 497; S. C., 12 Ab. Pr., N. S., 427; Opinion of Frick, J., in Speights *v.* Peters, 9 Gill, 476; Morrison *v.* Buckner, Hemp., 442; Rice *v.* St. Paul & Pacific R. Co., 24 Minn., 464.

[2] Parmly *v.* Tenth Ward Bank, 3 Edw. Ch., 395.

[3] Cremen *v.* Hawkes, 2 Jo. & Lat., 674.

[4] Drewry *v.* Barnes, 3 Russ., 94.

[5] Orphan Asylum *v.* McCartee. Hopk. Ch., 429; Corey *v.* Long, 43 How. Pr., 498; S. C., 12 Ab. Pr., N. S., 427.

[6] Goodyear *v.* Betts, 7 How. Pr., 187; Flagler *v.* Blunt, 32 N. J. Eq., 518. See, also, Orphan Asylum *v.* McCartee, Hopk. Ch., 429; Vose *v.* Reed, 1 Woods, 647.

[7] Kean *v.* Colt, 1 Halst. Ch., 365.

of appointment is usually invoked either for the prevention of fraud, to save the subject of litigation from material injury, or to rescue it from threatened destruction.[1] And to warrant the interposition of a court of equity by the aid of a receiver, it is essential that plaintiff should show, first, either a clear, legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand. And, secondly, it must appear that possession of the property was obtained by defendant through fraud; or that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.[2] Not only must the plaintiff show a case of adverse and conflicting claims to the prop-

[1] Baker *v.* Administrator of Backus, 32 Ill., 70.

[2] Mays *v.* Rose, Freem. (Miss.), 703. See, also, Leavitt *v.* Yates, 4 Edw. Ch., 162; Beecher *v.* Bininger, 7 Blatchf., 170. "An application for the appointment of a receiver," say the court, in Mays *v.* Rose, Freem. (Miss.), p. 718, "is one which is addressed to the sound discretion of the court, to be exercised as an auxiliary to the attainment of the ends of justice. It is one of the modes in which the preventive justice of a court of equity is administered. The great object is to secure the property or thing in controversy, so that it may be subjected to such order or decree as the court may make in the particular case. It is intended equally for the security of both plaintiff and defendant. The possession of the receiver is not adverse to or in hostility to the rights of the defendant; that possession is the possession of the court, held equally for the greater safety of all the parties concerned. A reference to the various decisions upon motions for the appointment of receivers, shows that each case has been made to depend upon its own peculiar features, and throws but little light upon any new case, except so far as they establish the general principles which should govern the court in the exercise of its discretion upon these motions. These principles are: that the plaintiff must show, first, either that he has a clear right to the property itself; or that he has some lien upon it; or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim. And secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. These are believed to be the general rules governing all applications of this kind."

erty, but he must also show some emergency or danger of loss demanding immediate action, and that his own right is reasonably clear and free from doubt.[1] If the dispute is as to title only, the court very reluctantly disturbs possession by a receiver, but if the property is exposed to danger and to loss, and the person in possession has not a clear legal right thereto, the court will interpose by a receiver for the security of the property.[2]

§ 12. It is in all cases essential to the exercise of the jurisdiction, that the plaintiff should have a present existing interest in the property over which he seeks to have a receiver appointed. And when it is apparent that he has parted with his entire interest in and title to the property, the court will not interfere, even though sufficient grounds may be shown to have warranted the relief, when the offense complained of was committed, and when plaintiff still had an interest in the subject-matter.[3] And a receiver will only be appointed in behalf of a party in interest in the litigation, and a stranger to the suit, who represents no interest at stake, is not entitled to participate in the proceedings, or to thrust himself forward and obtain a receiver, especially when the parties to the action are not desirous of having one appointed.[4] So the right to propose a suitable and proper person for receiver, after the order for his appointment has been granted, rests in the first instance with the parties in interest in the cause, and the court will not permit a stranger to the action to come in and propose a person for the office.[5]

§ 13. A receiver *pendente lite* is appointed only for the benefit of such of the parties to the cause as shall appear

[1] Beecher *v.* Bininger, 7 Blatchf., 170.

[2] Opinion of Clayton, J., in Lenox *v.* Notrebe, Hemp., 225.

[3] Smith *v.* Wells, 20 How. Pr., 158. And this principle would seem to hold good, even though plaintiff still has a right of action against defendants for the injury done to the property while he yet had an interest therein. Id.

[4] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Sup'r Ct. R., 223.

[5] Attorney-General *v.* Day, Madd., 246, 1st American edition, 470.

to be entitled to the fund in controversy, and not for the benefit of strangers to the suit. And if the receivership interferes with the rights of a stranger, he may apply to the court to be heard *pro interesse suo*, and his rights will be protected against any inequitable interference therewith by the officer of the court. But the appointment of the receiver does not give a mere stranger to the suit the benefit of the proceedings, so that he may claim what he would not otherwise have been entitled to.[1]

§ 14. It is important to observe, at the outset, that courts of equity lend their extraordinary aid by the appointment of receivers, as in the granting of injunctions, only in behalf of those who have used due diligence in the assertion of their rights, and in invoking the aid of the court. And a plaintiff, whose right is otherwise clear, and sufficient to entitle him to the relief, may be entirely debarred from the aid of the court by his own laches, which will be construed as a waiver of the right if he delays an unreasonable time in its assertion.[2] So an application for a receiver is not entitled to favorable consideration, when the plaintiff has lain by for a long period of years, and quietly acquiesced in a condition of affairs which he seeks to change by obtaining a receiver.[3] For example, where plaintiffs seek the aid of a

[1] Howell *v.* Ripley, 10 Paige, 43.

[2] Brown *v.* Chase, Walk. (Mich.), 43. And see Gould *v.* Tryon, id., 353; Gray *v.* Chaplin, 2 Russ., 126; Fogarty *v.* Bourke, 2 Dr. & War., 580; Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162. Brown *v.* Chase, Walk. (Mich.), 43, was a bill in equity for the foreclosure of a mortgage, on which an application was made for a receiver of the rents and profits of the mortgaged premises, on the ground of insufficiency of the security and insolvency of the mortgagor. The application for a receiver was made nearly three years after filing the bill. The court say: "The complainants have come too late with this motion. They filed their bill August 13, 1839, nearly three years ago, and, for aught that appears from their petition, might with due diligence have obtained a decree long before this time, and had the mortgaged premises sold. If they were entitled to a receiver, their neglect to apply for his appointment at an earlier day should be construed as a waiver of their right. Motion denied."

[3] Fogarty *v.* Bourke, 2 Dr. & War., 580; Gray *v.* Chaplin, 2 Russ., 126; Skinners Company *v.* Irish

receiver over property in which they claim some interest, but which has been in possession of defendants for a long period of years, during all which time plaintiffs and those under whom they claim have acquiesced in such possession, equity will not interfere by a receiver *in limine*.[1] So when the application is based upon the alleged misconduct of defendant as a trustee, and his misappropriation of funds, but it is shown that the state of affairs complained of has existed for very many years, with plaintiffs' knowledge and without objection on their part, the court will not take the property from defendant's hands and place it in the custody of a receiver.[2] And when the wrong complained of occurred, if at all, several years before the application for relief, and so long since as to afford no ground for apprehension of impending danger, and no act is alleged as being now threatened, a receiver will not be allowed.[3]

§ 15. The relief granted by courts of equity in the appointment of receivers *pendente lite* bears in many respects a close analogy to that by preliminary injunction. Some points of resemblance in the two forms of remedy have been already indicated, while others will frequently appear throughout the following pages. Both are extraordinary equitable remedies, as distinguished from the usual and ordinary modes of administering relief either in courts of law or of equity. Both are essentially preventive in their nature, being properly used only for the prevention of future injury, rather than for the redress of past grievances. Both, too, have one common object in as far as they seek to preserve the *res* or subject-matter of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the court. Perhaps the principal element of difference between these two important remedies lies in this: that an injunction is strictly a conservative remedy,

Society, 1 Myl. & Cr., 162. And see Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515.

[1] Gray *v.* Chaplin, 2 Russ., 126.

[2] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162.

[3] Kean *v.* Colt, 1 Halst. Ch., 365.

merely restraining action and preserving matters *in statu quo*, without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. A court of equity by an injunction ties up the hands of defendants, and preserves unchanged, not only the property itself, but the relations of all parties thereto. But in appointing a receiver, the court goes still farther, since it wrests the possession from defendant, and assumes and maintains the entire management and control of the property or fund, frequently changing its form, and retaining possession through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined.

§ 16. From the points of resemblance already indicated between these two extraordinary equitable remedies, it is not to be inferred that the appointment of a receiver necessarily follows from the granting of an injunction, or that the two remedies are necessarily inseparable. And while it frequently happens that the courts are called upon to administer both species of relief in the same action, and at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed, and the two are to be treated as distinct and independent matters. A court of equity may, therefore, refuse a receiver, although the case presented is a fitting one for an injunction, and although an injunction has already been granted.[1] It has been held, however, that the power of appointing a receiver, when the relief is necessary for the collection and preservation of property pending an injunction suit, is a necessary incident to the power of granting an injunction; and if the latter power be expressly con-

[1] Rawnsley *v.* Trenton Mutual Life & Fire Insurance Co., 1 Stockt., 347; Oakley *v.* Paterson Bank, 1 Green Ch., 173. And see Hall *v.* Hall, 3 Mac. & G., 85, where it was said by the Lord Chancellor that "the rights to those different remedies are essentially distinct, and depend upon totally different grounds and circumstances."

ferred by law upon a judge in vacation, the former may be regarded as conferred by implication.[1]

§ 17. Ordinarily, unless perhaps in the case of infants or lunatics, a suit must be actually pending to justify a court of equity in appointing a receiver;[2] and it follows, necessarily, that the person whose property it is sought to place in the receiver's hands must be made a party to the suit, in order that he may have an opportunity of resisting the application, the granting of which might result in irreparable injury to his interests.[3] And the facts relied upon as the ground for the relief should be distinctly and specifically set forth, in order that defendant may be fully apprised thereof and have an opportunity to resist the application.[4] It will not, therefore, suffice to allege in general terms that plaintiff is entitled on principles of equity to the interposition of the court, but the facts relied upon should specifically appear.[5] And while fraudulent conduct on the part of defendant, or danger to the property or fund in controversy, is frequently made the foundation for a receivership, it will not suffice merely to allege such fraud or danger upon information generally, without specifying the sources of the information. And a bill whose only allegations upon these points are thus vague and general does not present such a case as to justify the court in interfering by a receiver.[6] Nor will mere general averments of plaintiff's belief that the property in controversy will be wasted or destroyed, unless a receiver is appointed, warrant the court in interfering, but the grounds upon which such belief is founded should be set forth.[7]

[1] Penn *v.* Whiteheads, 12 Grat., 74.

[2] Baker *v.* Administrator of Backus, 32 Ill., 79; Merchants' & Manufacturers' National Bank *v.* Kent, Circuit Judge, 43 Mich., 292; Jones *v.* Schall, 45 Mich., 379; Hardy *v.* McClellan, 53 Miss., 507. And see *In re* Hancock, 27 Hun, 575.

[3] Baker *v.* Administrator of Backus, 32 Ill., 79. See, also, Dale *v.* Kent, 58 Ind., 584.

[4] Tomlinson *v.* Ward, 2 Conn., 396; Blondheim *v.* Moore, 11 Md., 365.

[5] Tomlinson *v.* Ward, 2 Conn., 396.

[6] Blondheim *v.* Moore, 11 Md., 365.

[7] Hanna *v.* Hanna, 89 N. C., 68.

§ 18. While insolvency of a defendant in possession, and against whom a receiver is sought, is frequently relied upon by the courts as a ground for granting the relief,[1] it is to be observed that insolvency will not of itself warrant a court in appointing a receiver. It must also appear that plaintiff has a probable cause of action against the defendant, and that the benefit to result from his recovery will either be wholly lost or substantially impaired by reason of the insolvency, unless a receiver is appointed.[2]

§ 19. As against a defendant in the possession and enjoyment of property which is the subject-matter of the litigation, equity always proceeds with extreme caution in appointing a receiver.[3] Where the property has been held and enjoyed by defendants in possession for a long series of years, and plaintiff shows no real danger, a receiver will not ordinarily be appointed *in limine*.[4] And where plaintiff's object is to assert a right to property possessed by defendant, a receiver, if appointed at all, is appointed only upon the principle of preserving the subject-matter pending a litigation which is to determine the rights of the parties. In all such cases, a court of equity necessarily exercises a large discretion as to whether it will or will not take possession of the property by its receiver, and this discretion is governed by a consideration of all the circumstances of the case. It is, therefore, difficult to establish any fixed rule in such cases, although it may be said generally, that if the case as presented upon the application for a receiver is clearly in favor of plaintiff, indicating that he will probably be entitled to a final recovery, the risk of injury to defendant is very small, and the court does not hesitate to interfere. If there be more doubt as to plaintiff's right, there

[1] See Leavitt *v.* Yates, 4 Edw. Ch., 162.

[2] Gregory *v.* Gregory, 33 N. Y. Supr. Ct. R., opinion of Jones, J., p. 39.

[3] Owen *v.* Homan, 4 H. L. Rep., 997, affirming S. C., 3 Mac. & G., 378; Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515.

[4] Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515.

is of course more difficulty in passing upon the application, the question being one of degree, as to which it is impossible to lay down any precise rule.[1]

[1] Owen *v.* Homan, 4 H. L. Rep., 997, affirming S. C., 3 Mac. & G., 378. The doctrine of the text is well stated in this case in the opinion of the Lord Chancellor, as follows, page 1032: "The receiver, if appointed in this case, must be appointed on the principle on which the court of chancery acts, of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the court must of necessity exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive, unvarying rule can be laid down as to whether the court will or will not interfere by this kind of *interim* protection of the property. Where indeed the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed, pending a litigation in the ecclesiastical court as to the right of probate or administration. No one is in the actual, lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The court, by taking possession at the instance of the plaintiff, may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may, by its *interim* interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by the appointment of a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case. When the evidence on which the court is to act (here the only evidence is the answer of Mrs. Homan) is very clearly in favor of the plaintiff, then the risk of eventual injury to the defendant is very small, and the court does not hesitate to interfere. Where there is more of doubt there is of course more of difficulty; the question is one of degree, as to which, therefore, it is impossible to lay down any precise and unvarying rule. In this case Lord Truro did not think the title of the plaintiff was so clearly made out as to justify the court in turning the defendant out of possession before the plaintiffs had finally established their right, and I am not prepared to say that the conclusion at which he arrived was wrong; on the contrary, I think it was right."

§ 20. As between tenants in common of personal property, the courts are usually averse to appointing a receiver over the joint property upon the application of one co-tenant against the other.[1] And one co-tenant can not, on the ground of a refusal of the other to divide the property, maintain a bill in equity for a receiver and for a sale and division, when it is not shown that the chattels were agreed to be or were used in carrying on any business for the joint benefit of the parties, as partners or otherwise; or that the tenancy in common was of such a nature as to require a sale of the chattels, or a termination of the tenancy; and when it does not appear that there is any necessity for a division of the property, on account of the death or insolvency of one of the co-tenants. And this is true, even though the bill charges the defendant with having the sole and exclusive use of the property, and that he is diminishing its value and refuses to make a division thereof, since the remedy for such grievances, if they amount to a conversion of the property, must be sought by an action at law.[2] So in the case of joint owners of the machinery and material of a printing office, upon a bill by one joint owner or tenant in common against the other for a partition of the property, which is in defendant's possession, the court will refuse a receiver if the defendant in possession will give adequate security for the rents and profits *pendente lite*.[3]

§ 21. The subject-matter of the jurisdiction of equity being property rights, a court of equity is not the proper forum for determining controversies concerning the right to hold public offices, all such questions being purely of a legal nature and cognizable only in courts of law. Equity will not, therefore, extend its extraordinary jurisdiction by the

[1] Low *v.* Holmes, 2 C. E. Green, 148; Blood *v.* Blood, 110 Mass., 545. As to the right to a receiver over personal property in an action for its sale and for a distribution of the proceeds among tenants in common, see Andrews *v.* Betts, 8 Hun, 322; Shehan *v.* Mahar, 17 Hun, 129.

[2] Blood *v.* Blood, 110 Mass., 545.

[3] Low *v.* Holmes, 2 C. E. Green, 148.

granting of injunctions and the appointment of receivers, to the extent of determining the rights of conflicting claimants to a public office, but will leave all such questions to be determined in the manner provided by law.[1] And where there are rival claimants to an office of a public nature, held by appointment from the executive of the state, a court of equity will not, in behalf of one of such claimants, enjoin the other from receiving the fees and emoluments of the office, and will not appoint a receiver of such fees, although it is alleged that defendant, who has intruded into the office, is insolvent. The appointment of a receiver in such a case would be, in effect, the assumption by the court of a right to make a temporary appointment to the office, which is by law required to be filled by the executive department of the government, and would be utterly foreign to the jurisdiction of a court of equity.[2] So where a contro-

[1] Tappan *v.* Gray, 9 Paige, 507. See, also, People *v.* Draper, 24 Barb., 265; Stone *v.* Wetmore, 42 Ga., 601.

[2] Tappan *v.* Gray, 9 Paige, 507. Complainant, claiming to be entitled to the office of flour inspector of the city of New York, filed his bill alleging that defendant had usurped the office and was receiving its fees and emoluments; that he was wholly insolvent and unable to respond for the fees which he might receive before the right to the office could be determined by legal proceedings; and prayed an injunction and a receiver. The Vice Chancellor decided that the bill showed a *prima facie* case of intrusion by defendant into complainant's office; and that defendant's insolvency was sufficient to sustain the bill until the right could be determined upon an information in the nature of a *quo warranto*. Upon appeal, Walworth, Chancellor, held as follows: "If the Vice Chancellor was right in the conclusion that the complainant was entitled to discharge the duties of the office of flour inspector, after the appointment by the governor during the recess of the senate, and that such appointment of the defendant to the office was illegal and unauthorized, I think he erred in supposing that this court had jurisdiction to afford the complainant any relief at this time. This court certainly ought not to assume the jurisdiction to oust an officer in no way connected with the administration of justice here, and over whose appointment it has no control, from an office, the duties of which he is discharging under color of an appointment from the executive of the state, until his right to such office has been settled in the mode prescribed by the Revised Statutes for the determination of his claim. That, however, would be the necessary effect of an in-

versy is pending in *quo warranto* to test the right to a public office, equity will not assume jurisdiction over the matter, or appoint a receiver to take charge of the fees and emoluments of the office. A receiver is appointed by a court of equity only when a controversy is actually pending in that court, and a proceeding in *quo warranto* being a legal proceeding, and depending upon legal and not equitable rights, equity will not interfere, the exercise of its jurisdiction in such a case being contrary to public policy as well as unsustained by authority.[1]

§ 22. When, however, the question is not one which affects the right or title to the office in controversy, but merely the right to its fees or profits as property, in which plaintiff claims a right or interest by virtue of contract relations with the officer, there would seem to be no objection upon principle to interfering by a receiver in a case otherwise appropriate for the relief.[2] And when a public officer had assigned the profits and emoluments of his office to trustees to secure payment of his debts, a receiver was appointed *pendente lite*, upon a bill to compel the execution of the trust, but without prejudice to the question of

junction such as is prayed for in this case. For the receiving and intermeddling with and enjoying the fees, profits and advantages of the office are so connected with the proper discharge of the duties of the office itself, that they could not be separated without rendering the office of no benefit whatever to the defendant, should he finally succeed in establishing his right to it on the *quo warranto*. Such relief, therefore, could not be granted without depriving the public of the benefit which the inspection law contemplates, until the termination of this litigation. And it would be equally inconsistent with public policy and the rights of those who are interested in having the duties of the office properly discharged, to appoint a receiver of the fees and emoluments of such an office. The appointment of a receiver to discharge the duties of the office, in connection with the receipt of the fees and emoluments, would be still more objectionable in principle, as it would, in effect, be the assumption of a right by this court to make a temporary appointment of a public officer, whose appointment is by law required to be made by the executive department of the government."

[1] Stone *v.* Wetmore, 42 Ga., 601.

[2] Palmer *v.* Vaughan, 3 Swans., 173; Cheek *v.* Tilley, 31 Ind., 121.

whether the profits were assignable.[1] So when a deputy clerk was employed by a clerk of the court upon a contract providing that he should receive as compensation for his services one-half the fees of the office, in an action by the deputy against the principal to recover the amount due under the contract, an injunction was granted and a receiver appointed to collect the fees pending the litigation, plaintiff alleging the insolvency of defendant and his inability to satisfy any judgment which might be had against him. And the relief was based upon the ground that the collection of the fees was not an official duty, but a right pertaining to the officer individually; and that plaintiff, under his contract, was entitled to the same right, since a portion of the fees belonged to him, and they might be collected by a receiver without in any manner interfering with defendant's official duties.[2] But equity will not appoint a receiver of the salary of a public officer when there is no permanent fund out of which it is payable, it being paid out of an allowance voted by parliament from year to year; and when no action can be maintained to recover the allowance or to enforce its payment.[3]

§ 23. In many of the states of this country the jurisdiction of the courts over the subject of receivers has been, to a considerable degree, fixed or controlled by legislation, enlarging or abridging the jurisdiction as exercised by courts of equity independent of statute. This is especially true of those states which have adopted codes of procedure similar to that of New York. And in New York it is held that the appointment of a receiver, like other provisional remedies prescribed in the code of procedure, is a mere incident of the general jurisdiction of the courts, and not an essential part of such jurisdiction. And the legislature, having pre-

[1] Palmer *v.* Vaughan, 3 Swans., 173. But the court directed that if the parties should consent to such an arrangement, the fees and profits of the office might be paid into court, in lieu of appointing a receiver.

[2] Cheek *v.* Tilley, 31 Ind., 121.

[3] Cooper *v.* Reilly, 1 Russ. & M., 560, affirming S. C., 2 Sim., 560.

scribed the cases in which a receiver may be appointed *pendente lite*, and as a proceeding in the action, have as carefully excluded all other cases, thus prohibiting the appointment except as authorized by the code.[1] But in North Carolina, while the code of procedure has specified certain cases in which a receiver may be appointed, it is held that the code has not materially altered the general equity jurisdiction of the courts over the subject, which remains as before.[2] In England, under the Supreme Court of Judicature Act of 1873, the power of appointing receivers has been extended to all cases where it shall appear to the court to be just or convenient, and the relief may be granted either unconditionally, or upon such terms as the court may deem just.[3]

§ 24. An important principle of general application in the exercise of this branch of the extraordinary jurisdiction of equity is that plaintiff is never entitled to a receiver when the equities of his case are fully and fairly denied by the sworn answer of defendant. When, therefore, the application for a receiver is made after the coming in of the answer, and the equities of the bill upon which the receiver is sought are fully denied by defendant's answer under oath, and the evidence adduced in support of the bill does not overcome the denials of the answer, the court will refuse

[1] Fellows *v.* Heermans, 13 Ab. Pr., N. S., 1.

[2] Skinner *v.* Maxwell, 66 N. C., 45. See, also, Battle *v.* Davis, id., 252.

[3] Supreme Court of Judicature Act, August 5, 1873. Paragraph 8 of section 25 provides as follows: "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just," etc. See this act construed in Pease *v.* Fletcher, 1 Ch. D., 273; Porter *v.* Lopes, 7 Ch. D., 358; Anglo-Italian Bank *v.* Davies, 9 Ch. D., 275; Bryant *v.* Bull, 10 Ch. D., 153; Smith *v.* Cowell, 6 Q. B. D., 75; Fuggle *v.* Bland, 11 Q. B. D., 711; Howell *v.* Dawson, 13 Q. B. D., 67; *In re* Coney, 29 Ch. D., 993; Stanger Leathes *v.* Stanger Leathes, Weekly Notes, 1882, p. 71.

to appoint a receiver.[1] In such cases, the plaintiff, having addressed himself to the conscience of the defendant, has made him a witness and must take his answer as true, unless he can overcome it by other testimony.[2] And the question is no longer regarded as one addressed to the discretion of the court, but it is judicial error to appoint a receiver when the charges of the bill are thus denied.[3] So if a receiver has already been appointed, he will be discharged upon the coming in of defendant's answer fully denying the equities of the bill.[4] Indeed, the rule as here stated is analogous to the well-established rule which governs applications for the dissolution of interlocutory injunctions, which is, that defendant is entitled to a dissolution of the injunction upon filing his answer fully denying the equities of the bill.[5]

§ 25. The question whether an appeal will lie from an order granting or refusing a receiver *in limine* is one of considerable importance, upon which the authorities are far from reconcilable. The conflict of authority upon this point is attributable in part to the difference in practice in the different states with regard to appeals, and in part to the different views of the courts as to whether such orders are final in their nature and affect the substantial rights of the parties. It may be safely said that, since the appointing or refusing a receiver is largely a matter of sound judicial discretion, if the testimony addressed to the court below is conflicting, and if that court, after duly weighing and considering it, refuses to appoint a receiver, an appellate court

[1] Thompsen *v.* Diffenderfer, 1 Md. Ch., 489; Simmons *v.* Henderson, Freem. (Miss.), 493; Henn *v.* Walsh, 2 Edw. Ch., 129; Buchanan *v.* Comstock, 57 Barb., 581; Fairbairn *v.* Fisher, 4 Jones Eq., 390; Callanan *v.* Shaw, 19 Iowa, 183; Rhodes *v.* Lee, 32 Ga., 470.

[2] Thompsen *v.* Diffenderfer, 1 Md. Ch., 489.

[3] Fairbairn *v.* Fisher, 4 Jones Eq., 390.

[4] Drury *v.* Roberts, 2 Md. Ch., 157; Voshell *v.* Hynson, 26 Md., 83.

[5] Simmons *v.* Henderson, Freem. (Miss.), 493. And see for application of the rule to cases of injunctions, Parkinson *v.* Trousdale, 3 Scam., 367; Roberts *v.* Anderson, 2 Johns. Ch., 202; Hollister *v.* Barkley, 9 N. H., 230; Hatch *v.* Daniels, 1 Halst. Ch., 14; Washer *v.* Brown, id., 81.

will not interfere with the exercise of this discretion, in the absence of any facts showing that it has been abused.[1] And when the testimony is conflicting and the court below has, after hearing, refused to revoke its appointment of a receiver, an appellate court will refuse to control the discretion of the inferior tribunal.[2]

§ 26. It has been said in general terms, upon the question under consideration, that since the appointment of a receiver to take charge of property *pendente lite* is an interlocutory order, no appeal will lie therefrom.[3] And it was formerly held in Indiana, that an appeal would not lie from the refusal of a court below to set aside the appointment of a receiver, all orders touching the appointing or removing of receivers being regarded as interlocutory orders, and the statute authorizing appeals from interlocutory orders not embracing such cases.[4] But by a later statute an appeal is authorized from an order appointing or refusing a receiver.[5] And it is held in Nevada, under the practice and procedure in that state, that an appeal will not lie from an interlocutory order appointing a receiver, and that the action of the inferior court in such matters can only be revised upon an appeal from the final judgment in the cause.[6] So in Pennsylvania, where an appeal lies only from a final order or decree, an order granting an injunction and appointing a receiver, upon the filing of a bill for the settlement of partnership affairs, is not such a final order within the intent of the statute, and no appeal will lie therefrom, it being purely an interlocutory matter.[7] And it is held in Ohio, that an order appointing a receiver to take the revenues of a railway and bring them into court, subject to its order and

[1] Reid *v.* Reid, 38 Ga., 24; Gunby *v.* Thompson, 56 Ga., 316; Crawford *v.* Spurling, 56 Ga., 611; Gardner *v.* Howell, 60 Ga., 11.

[2] Robenson *v.* Ross, 40 Ga., 375; Cohen *v.* Meyers, 42 Ga., 46.

[3] Wilson *v.* Davis, 1 Montana, 98.

[4] Wood *v.* Brewer, 9 Ind., 86.

[5] Dale *v.* Kent, 58 Ind., 584. And see Buchanan *v.* Berkshire Life Ins. Co., 96 Ind., 510.

[6] Meadow Valley Mining Co. *v.* Dodds, 6 Nev., 261.

[7] Holden's Administrators *v.* McMakin, Par. Eq. Cas., 270.

without making any application of the funds, except as to certain accrued costs, is not a final order from which an appeal will lie.[1] So in Illinois, a writ of error will not lie to a purely interlocutory order appointing a receiver, no final decree having been rendered determining the rights of the parties.[2] And in Tennessee, even under a statute authorizing the supreme court to grant writs of *supersedeas* to interlocutory orders, as in case of a final decree, an order appointing a receiver, being within the discretion of the court for the purpose of preserving property *pendente lite*, can not be superseded by the supreme court.[3] Nor will a bill of review lie to revise or correct the action of the court in appointing a receiver, since, the order being interlocutory, it may be revised or corrected by the same court; or, if improvidently made, it may be corrected upon the final hearing.[4] So under the statute of California regulating appeals, no appeal lies from an order appointing a receiver.[5] And in Kansas, an order of a judge at chambers appointing a receiver is not a final order involving the merits of the action, but a mere provisional or interlocutory order from which no appeal will lie.[6]

§ 27. In Michigan, where the laws of the state restrict the right of appeal to decrees and final orders, the question under discussion has been made to turn upon whether the appointing of a receiver is a substantial decision of the merits involved, and the principal relief sought, or whether it is merely ancillary, or incidental to the principal relief.

[1] Eaton & Hamilton R. Co. *v.* Varnum, 10 Ohio St., 622. But see C. S. & C. R. Co. *v.* Sloan, 31 Ohio St., 1, for a full discussion of the right of appeal in such cases as affected by the code of procedure, as well as the power to appoint or discharge a receiver by a judge at chambers.

[2] Coates *v.* Cunningham, 80 Ill., 467.

[3] Baird *v.* Turnpike Co., 1 Lea, 394; Bramley *v.* Tyree, 1 Lea, 531; Roberson *v.* Roberson, 3 Lea, 50.

[4] Johnston *v.* Hanner, 2 Lea, 8.

[5] French Bank Case, 53 Cal., 495; Emeric *v.* Alvarado, 64 Cal., 529.

[6] Hottenstein *v.* Conrad, 5 Kan., 249; Kansas Rolling Mill Co. *v.* A., T. & S. F. R. Co., 31 Kan., 90.

Thus, where the object of the action is to remove the administrators of an estate, and to procure a receiver to take charge of the assets until the question of removal is determined, the order appointing a receiver, although nominally interlocutory, is regarded as in effect a final order or decree, from which an appeal will lie, since it gives the relief prayed for as the end and object of the bill upon that branch of the case.[1] So upon a bill by the executor of a deceased partner for an account of the partnership transactions, an order for a receiver to take charge of the property held by defendant as surviving partner, although interlocutory in point of time, is in substance and effect a decree of the court to the extent that an appeal will lie therefrom. The order is, therefore, to be considered as regards its effect upon the rights of the parties, rather than as to the stage of the cause when made. And since the defendant, who would otherwise be entitled to possession of all the assets and to close up the firm business, is by the order divested of all control over the matter, and the entire management of the business is placed in the receiver's hands, the order partakes of the nature of a decree, to the extent, at least, of being appealable.[2] Where, however,

[1] Lewis *v.* Campau, 14 Mich., 458.

[2] Barry *v.* Briggs, 22 Mich., 201. Campbell, C. J., observes, p. 206: "The effect of this order (appointing the receiver) is to divest the entire legal estate of defendant in property over which he had this exclusive control, as well as exclusive title, and in which he was equitably as well as legally interested, and in which no one else had any rights, except to receive the amount which might belong to the deceased partner's estate after the accounts should be closed and the funds converted. The specific property and its disposal belonged to defendant. A certain share of the net proceeds would belong to the executor. The order divests the whole body of the property, and puts its management as well as ownership into other hands. It does very nearly all that could be done under the bill by a decree upon the hearing. The striking of balances and the final distribution, although not universally are quite frequently subsequent steps to the principal decree; and in the present case, the principal object of the bill is to transfer the trust into new hands, for execution. All the other objects are subordinate to this main purpose. An adjudication which produces such impor-

the receivership is merely ancillary or incidental to the principal relief sought, no appeal will lie from an order appointing a receiver.[1] So an order appointing a receiver to take possession of certain securities claimed by a trustee, the title to which is in dispute, is treated as an interlocutory order resting in the discretion of the court, and hence not appealable.[2] And an order refusing a receiver in an action for the foreclosure of a mortgage is merely interlocutory and not appealable.[3] And it is held under the code of procedure in New York, that an appeal will lie from an order denying a motion for a receiver, since the appellate court may review all orders which affect a substantial right, even though they rest in the discretion of the court.[4] So under the statutes of Minnesota an order refusing a receiver in accordance with the report of a referee is an order refusing a provisional remedy, from which an appeal will lie.[5] And in the same state an order appointing a receiver is an order affecting a substantial right of the defendant and is appealable.[6]

tant effects, and which actually transfers the entire estate from the defendant, is to all intents and purposes a decree as far as it goes. . . . It would be a very singular thing if a court could, by anticipating the proper date of a decree which would be appealable, produce all the consequences of a decree, and yet deprive a party of his right to a review. The statutes regulating appeals have regard to the rights of parties, and not to senseless formalities. And the practice in this state, as well as elsewhere, has always been to apply them to that end. . . . We think the order in the case before us is appealable, because it divests defendant's estate." Motion to dismiss appeal denied.

[1] Duncan *v.* Campau, 15 Mich., 415.

[2] Brown *v.* Vandermeulen, 41 Mich., 418.

[3] Beecher *v.* M. & P. R. M. Co., 40 Mich., 307.

[4] Dollard *v.* Taylor, 33 N. Y. Supr. Ct. R., 496. And see as to the power of the courts of New York under the code, pending an appeal from a judgment, to appoint a receiver in behalf of appellant, over property of which the other party would otherwise be entitled to possession under the judgment of the court, Fellows *v.* Heermans, 13 Ab. Pr., N. S., 1.

[5] Grant *v.* Webb, 21 Minn., 39.

[6] Knight *v.* Nash, 22 Minn., 452.

§ 27*a*. If the decree appointing a receiver determines the right to the property in controversy, so that the party in whose favor it is rendered is entitled to its immediate execution, an appeal will lie, even though something still remains to be done to fully carry the decree into execution. Thus, when a bill is filed by stockholders to set aside a lease of the property of a corporation upon the ground of fraud, and for the appointment of a receiver, and upon a hearing on the merits a decree is rendered setting aside the lease, appointing a receiver, and directing that the company and its directors deliver to him all corporate property, records and papers, and that he continue the business of the company, the decree is so far final that an appeal will lie, even though an accounting is still necessary to adjust the rights of the parties.[1]

§ 28. Under the practice prevailing in New Jersey, it is held that, if the court below upon the case presented had authority and jurisdiction to order the appointment of a receiver, if in making such order no manifest error was committed, it will not be reversed on *certiorari;* and that to reverse the action of the lower court by *certiorari*, it must appear to the appellate tribunal that the order was an illegal one. And in such case the appellate court will not weigh the evidence on which the court below acted, and if there was enough in the case to give the court below jurisdiction and power to act, that will be deemed sufficient.[2]

§ 29. As regards the effect of an appeal upon the functions of a receiver appointed by the court below, it has been held in Ohio, that where receivers are appointed in an action to obtain the direction and judgment of the court as to the construction of a will, and as to the duties of executors in carrying it into effect, and praying for an order of sale of real estate for the payment of legacies, and for distribution, the receivers still remain in office pending an

[1] Winthrop Iron Co. *v.* Meeker, 109 U. S., 180.

[2] Journeay *v.* Brown, 2 Dutch., 111.

appeal from the judgment of the court below.[1] But in Florida, where the laws of the state authorize appeals from interlocutory orders, and authorize the appellate court to issue a *supersedeas* pending such an appeal, if a *supersedeas* is granted on an appeal from an order allowing a preliminary injunction and a receiver, it has the effect of suspending the power of the court below, and hence the power of its officer, the receiver, whose authority thus becomes nugatory by operation of law. And while it does not render unlawful any act done by the receiver before the appeal was taken, it forbids him further to act; and it then becomes his duty to restore the property to the person from whom it was taken, since his authority to take being inoperative, his authority to hold is equally so, both being derived from the same order.[2] In California, it is held that upon an appeal from an order adjudging a defendant to be insolvent, the functions of a receiver appointed in the cause are not suspended; and the court will not, therefore, stay proceedings in an action brought by the receiver.[3]

§ 30. When two different persons whose interests are conflicting are proceeding for the appointment of a receiver in separate actions, the question whether the receiver shall be appointed upon motion of one plaintiff or the other is regarded as of minor importance when the object of each proceeding is the preservation of the fund in controversy, and its ultimate distribution among creditors. And when, in such case, the appointment in one suit is not completed by reason of an appeal from the order, the court may permit the plaintiff in the other suit to proceed and obtain a receiver of the fund for the benefit of all concerned, and such appointment will not be vacated.[4]

§ 31. As regards the nature of defendant's interest in property which it is sought to subject to a receivership, it

[1] Swing *v.* Townsend, 24 Ohio St., 1. But see Allen *v.* Chadburn, 3 Baxter, 225.

[2] State *v.* Johnson, 13 Fla., 33.

[3] *In re* Real Estate Associates, 53 Cal., 356.

[4] Lottimer *v.* Lord, 4 E. D. Smith, 183.

has been held that if the property is such as to be subject to execution by creditors of defendant, it is competent for a court of equity to appoint a receiver; otherwise not. And relying upon this distinction, the court refused to appoint a receiver over a pension granted by government to the defendant, who had conveyed his interest therein, with other property, to secure an annuitant.[1]

§ 32. A receiver will not be appointed over property of such a nature that it is impossible for the court to put him in possession, and when the court has no control over the officers or persons entrusted with the management of the property, as in the case of a permit or license to occupy a stall in a city market, the control of which is wholly vested in certain municipal officers, whose discretion in granting or withholding the permit is beyond control by the courts.[2] Nor will a court of equity grant a receiver over certain rates or taxes, which are to be fixed by a future assessment and to be collected at a future period by public officers designated for that purpose, upon the application of a creditor who has loaned money for a work of public improvement, to be repaid out of such rates. And it is a sufficient objection to the relief in such a case, that the remedy at law, by *mandamus* or otherwise, to compel the officers to act, affords an adequate protection to the creditor.[3]

§ 33. While it is competent for a court of equity, by an interlocutory order, to take possession of property by its receiver, pending litigation concerning the rights of the parties, yet where the rights of third persons have intervened, who are not parties to the record, as in the case of innocent purchasers of the property in contest, the court will not exercise its extraordinary jurisdiction by ordering the property into the possession of its receiver. The relief will be refused in such case, on the ground that the rights of purchasers in good faith are not to be adjudicated or determined

[1] Davis *v.* Duke of Marlborough, 1 Swans., 74; S. C., 2 Wils. Ch., 130. See S. C., 2 Swans., 108.

[2] Barry *v.* Kennedy, 11 Ab. Pr., N. S., 421.

[3] Drewry *v.* Barnes, 3 Russ., 94.

in the summary and collateral method of an order to surrender possession to a receiver.[1]

§ 34. Peril to the fund in litigation is a frequent ground for the interference of equity by a receiver, when the danger is such as to demand the summary interference of the court in order to preserve the fund, which would otherwise be lost. Thus, upon a bill to restrain the infringement of a patent right, when an injunction has been granted *pendente lite*, and it is apparent that if plaintiff's rights are ultimately established he will be entitled to a large share of the money received by defendants from sales of the patented machines, and defendants are shown to be in insolvent circumstances, and to have debts due them to a large amount for machines sold since the granting of the injunction, sufficient danger to the fund is shown to warrant the court in appointing a receiver.[2]

§ 35. As a general rule, where the object of the action is only to compel payment of a sum of money, the courts will not appoint a receiver upon the filing of the bill.[3] And in an ordinary action for money had and received by defendant to the use of plaintiff, it is not proper to allow a receiver when there is no allegation or pretense that the money is in danger of being lost, or that it will be in jeopardy during the pendency of the action unless a receiver is appointed.[4] But when one has received subscriptions to a given project, depositing the funds with third parties, and the project is abandoned, a subscriber electing to withdraw his subscription is entitled, in an action against the different parties, to have a receiver of the fund in controversy. And it is not a sufficient objection to the relief, in such case, that a receiver of the fund has been appointed in a previous action of the same nature; but the powers and functions of

[1] Levi *v.* Karrick, 13 Iowa, 344.

[2] Parkhurst *v.* Kinsman, 2 Blatchf., 78.

[3] Hager *v.* Stevens, 2 Halst. Ch., 374.

[4] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 223.

the second receiver will be made subordinate to those of the first, and when the first becomes *functus officio*, the second will become entitled to the custody of the fund, or of so much thereof as remains.[1] But this doctrine is to be accepted with the limitation that the subsequent receiver takes only what is undisposed of by the court in the former litigation.[2]

§ 36. While it is sometimes necessary for the court, by its receiver, to continue the management of the business over which the receiver is appointed, for the purpose of effecting a more satisfactory adjustment and for better protecting the interests of all parties, yet the courts are generally averse to assuming the management of a business except as incidental to the object of the suit, and for the purpose of closing it up and dividing the proceeds. And a receiver will not be appointed to continue the management of a business which, from its nature, can not be conducted under the direction of the court, as in the case of a theater.[3] Nor will a receiver be authorized to begin a business which has not yet been undertaken by the parties, such as the manufacture and sale of medicines under letters patent; nor will the court require the parties, in such case, to disclose to the receiver secrets concerning the manufacture of such medicines.[4]

§ 37. Where parties to the action are before the court upon the appointment of a receiver, and have a right to object to the order of the court, or to appeal therefrom, but submit to the order without objection and without subsequently appealing, their submission will be deemed an acquiescence in the order, so far as to render it the law of the case with respect to the right to a receiver. Such persons can not, therefore, call in question the propriety of the ap-

[1] Bailey *v.* O'Mahony, 33 N. Y. Supr. Ct. R., 239.

[2] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 223.

[3] Waters *v.* Taylor, 15 Ves., 10.

[4] Merrell *v.* Pemberton, 62 Ga., 29.

pointment upon a final application for a disposal of the funds in the receiver's hands.[1]

§ 38. From the nature of a receiver's duties, and his attitude and relation toward the court as its representative or officer, he is held to a strict accountability for the faithful performance of the trust reposed in him. Especially is this the case when his position and duties with reference to the property or trust confided to him as receiver are in any degree inconsistent with other interests which he has in the same property; and in such case the court will scrutinize his conduct with extreme care, and will hold him to a strict performance of his duties.[2]

§ 39. It has been held that the appointment of a receiver is not necessarily a judicial act in all cases, in the sense that it must be made only by the courts. And the right of the legislature of a state to enact a law, authorizing the governor of the state to appoint a receiver of an insolvent banking corporation, is not a violation of the constitutional provision limiting each department of the government to its own particular sphere; the appointment of a receiver under such law being in no manner a decree or judgment affecting title to property, and not being a final determination of any rights, either legal or equitable.[3]

[1] Post *v.* Dorr, 4 Edw. Ch., 412.

[2] Bolles *v.* Duff, 54 Barb., 215; S. C., 37 How. Pr., 162.

[3] Carey *v.* Giles, 9 Ga., 253.

CHAPTER II.

OF THE COURTS EXERCISING THE JURISDICTION.

I. What Courts May Appoint Receivers.

§ 40. The jurisdiction exercised in the appointment of receivers has always been treated as a purely equitable one, and the remedy has been generally regarded, next to that by injunction, as the most efficient and salutary of the extraordinary remedies known to courts of equity. Finding its origin in the English Court of Chancery, it was, until the recent abolition of that court as a distinct tribunal, always regarded as one of its most efficient remedies, although granted with caution and only upon a satisfactory showing of the necessity for the immediate interposition of the court. It has also been a favorite remedy of the Irish Court of

Chancery, whose decisions afford an exceedingly instructive presentation of the principles underlying the jurisdiction, and of the conditions necessary to justify its exercise.

§ 41. In those states of this country which have preserved a distinct chancery system, the relief has always been granted by the chancery courts, which have adopted and followed the general principles governing the remedy under the English system, enlarging and shaping the jurisdiction to adapt it to the different conditions in this country. In the states which have blended the systems of equity and law, or which have adopted codes of procedure, relief by receivers is generally granted by the various courts of general jurisdiction throughout the states. By whatever name these courts are known, the jurisdiction has preserved its distinctive equitable character, and is still exercised upon the same general principles of equity by which it was governed before the adoption of the various codes of procedure. It is also strictly an original in distinction from an appellate power, and is generally exercised by courts of original jurisdiction only. In Tennessee, however, it would seem that the supreme court of the state may, pending an appeal thereto from an inferior court, appoint a receiver to take charge of the subject-matter of litigation, in a case otherwise appropriate for the relief.[1] But while that court has power to appoint a receiver when necessary to the proper administration of its appellate jurisdiction, yet to warrant the exercise of the power the property in controversy must be first brought under the jurisdiction of that court by virtue of an appeal, or of some order or decree of the court, and the person against whom the receiver is sought must be subject to its jurisdiction.[2] And the supreme court of the United States has refused in a particular case to appoint a receiver over the property of a railway pending an appeal from a decree of foreclosure, but without deciding whether

[1] West *v.* Weaver, 3 Heisk., 589. And see Allen *v.* Harris, 4 Lea, 190.

[2] Kerr *v.* White, 7 Baxter, 394.

a case might not arise in which the power might be exercised pending an appeal.[1]

§ 42. The appointment of receivers being a power pertaining to courts which are vested with chancery jurisdiction, a court of probate powers only can not appoint a receiver in aid of the collection of the estate of a deceased person.[2] Where, however, a probate or county court, under the code of procedure of the state, is empowered to hear and determine civil causes, and such court has rendered judgment against a debtor in a case properly falling within its jurisdiction, it may appoint a receiver upon proceedings supplemental to execution in the nature of a creditor's bill to enforce the judgment.[3]

§ 43. Where, under the laws of a state, the power of appointing receivers is confined to the chancellor alone, and the register of court is specially prohibited from making the appointment, an order of court referring the appointment to the register is not simply error in a case within his jurisdiction, but is the exercise of a power clearly beyond his control, and is therefore utterly void. And it is proper for the supreme court of the state to correct such unauthorized action on the part of the chancellor by the writ of prohibition.[4] So where a statute authorizes the appointment of a receiver and the approval of his bond by the court, but not by the judge or clerk in vacation, the appointment must be made by the judge in term time, and not in vacation, and an appointment by the judge in vacation and the approval of the bond by the clerk will be held invalid.[5]

§ 44. It would seem to be unnecessary that the property constituting the subject-matter of litigation should be within the jurisdiction of the court, provided the parties in interest are subject to its control, and there are frequent instances

[1] Pacific Railroad *v.* Ketchum, 95 U. S., 1.

[2] Scott *v.* Searles, 13 Miss., 25.

[3] Second Ward Bank *v.* Upmann, 12 Wis., 499.

[4] *Ex parte* Smith, 23 Ala., 94.

[5] Newman *v.* Hammond, 46 Ind., 119.

where the English Court of Chancery has appointed receivers over estates or property situated in foreign countries.[1] In such cases it would seem to be the better practice that the receiver himself should be within the jurisdiction of the court, and that he should be allowed to appoint his own agent in the foreign country for the management of the property there.[2] It is to be observed, however, that while the power of courts of equity to extend their extraordinary aid over property in a foreign country is thus clearly recognized, it will not be exercised when the parties in interest in the property, or representing it, are not before the court or subject to its control.[3] And a receiver will not be appointed as against a purchaser of the interest of one partner, residing and conducting the business in another state.[4] But the fact that the property over which a receiver is sought is located partly in one state and partly in another, as in the case of a railway corporation whose line extends through two different states, the company being incorporated in both, will not prevent the courts of one of the states from appointing a receiver to take charge of the railway, in a case otherwise appropriate for the relief.[5]

§ 45. It is held to be competent for a court of chancery in one country to appoint a receiver and grant an injunction in aid of the enforcement of a decree in chancery in a foreign country.[6] The power, however, will not be exercised in such a case when it is doubtful, upon the record, whether plaintiffs will ultimately be entitled to a decree in the second action.[7]

§ 46. Under the practice of the English Court of Chancery, receivers were frequently appointed pending a litigation

[1] See Davis *v.* Barrett, 13 L. J., N. S. Ch., 304; Langford *v.* Langford, 5 L. J., N. S. Ch., 60; Sheppard *v.* Oxenford, 1 Kay & J., 491; —— *v.* Lindsey, 15 Ves., 91.

[2] —— *v.* Lindsey, 15 Ves., 91.

[3] Shaw *v.* Shore, 5 L. J., N. S. Ch., 79.

[4] Harvey *v.* Varney, 104 Mass., 436.

[5] State *v.* Northern Central R. Co., 18 Md., 193.

[6] Houlditch *v.* Lord Donegal, 8 Bligh, N. S., 301.

[7] Houlditch *v.* Lord Donegal, Beat., 146.

in the ecclesiastical court over the probate of a will, or the right to administer an estate. The relief was granted in this class of cases, not because of the contest in another court, but because there was no person to receive the assets, and it was therefore the duty of a court of equity to lend its aid for the preservation of the assets pending the litigation.[1] The court, however, was averse to interfering by a receiver with the person in possession under the will, when the property was of small value.[2] And in a contest between two different executors, claiming under two different wills of the deceased, a receiver would not be extended over the rents and profits of real estate held by a defendant claiming under a title adverse to both wills.[3] And since the power was exercised only for the preservation of the property, a receiver would not be appointed when no danger was shown, and no reason why the plaintiff could not have administration *pendente lite*, to secure and preserve the property.[4] Where, however, the bill showed a gross case of fraud on the part of defendants contesting a will in the ecclesiastical court, and that the whole object of the litigation in that tribunal was to delay probate of the will, equity would take jurisdiction and appoint a receiver over the estate, notwithstanding the power of the ecclesiastical court to appoint an administrator *pendente lite*.[5] But an act of parliament having authorized the ecclesiastical court, pending a litigation as to the probate of a will, when there was some obstacle or bar in the way of administration, to appoint an administrator *pendente lite*, with full powers in the management of the property, except as to distributing the residue, and such administrator having been appointed

[1] Watkins *v.* Brent, 1 Myl. & Cr., 97; Marr *v.* Littlewood, 2 Myl. & Cr., 454. See, also, Atkinson *v.* Henshaw, 2 Ves. & Bea., 85; Ball *v.* Oliver, id., 96; Parkin *v.* Seddons, L. R., 16 Eq., 34.

[2] Whitworth *v.* Whyddon, 2 Mac. & G., 52.

[3] Jones *v.* Goodrich, 10 Sim., 327.

[4] Richards *v.* Chave, 12 Ves., 462; Knight *v.* Duplessis, 1 Ves., 324.

[5] Atkinson *v.* Henshaw, 2 Ves. & Bea., 85. See, also, Ball *v.* Oliver, id., 96.

by that court, equity would refuse to appoint a receiver, since the only effect of the appointment would be to produce an unseemly conflict between the two courts.[1] If, however, the ecclesiastical court had not yet exercised its power by appointing an administrator *pendente lite*, it was held that equity might interfere as before the statute, in a proper case, and might appoint a receiver of the personal estate, when probate of the will had been delayed.[2]

§ 47. Questions of much nicety have sometimes arisen in this country as to the extent to which the courts of one state will recognize the functions and powers of a receiver appointed in another state, and as to the right of such receivers to act beyond the territorial jurisdiction of the court appointing them. The better doctrine upon this subject undoubtedly is that the legal authority of a receiver is co-extensive only with the jurisdiction of the court appointing him, and that as a matter of strict right the courts of one state are not bound to recognize a receiver appointed in a foreign state. The rule is founded upon the recognized principle that the laws of one state have no force, *proprio vigore*, beyond the territorial limits of such state, although, upon considerations of courtesy or comity, they may be permitted to operate in another state for the promotion of justice, when neither the latter state nor its citizens will suffer any inconvenience from the application of the foreign law. The question, then, becomes one of comity between the different states, and it is upon such considerations alone that the courts of one state may recognize and enforce the acts of a receiver appointed in another state, when no detriment is thereby caused to the citizens of the state in which the functions of the foreign receiver are asserted.[3] Thus,

[1] Veret *v.* Duprez, L. R., 6 Eq., 329. See, also, Hitchen *v.* Birks, L. R., 10 Eq., 471.

[2] Parkin *v.* Seddons, L. R., 16 Eq., 34.

[3] Hoyt *v.* Thompson, 5 N. Y., 320, reversing S. C., 3 Sandf., 416; Willitts *v.* Waite, 25 N. Y., 577; Taylor *v.* Columbian Insurance Co., 14 Allen, 353; Hunt *v.* Columbian Insurance Co., 55 Me., 290. See Hoyt *v.* Thompson's Executor, 19 N. Y., 207.

a receiver of an insolvent corporation appointed under the laws of New Jersey, with power to take possession of all the effects of the corporation, and to convey or assign all its property, real and personal, may assign an indebtedness due to the corporation from a citizen of New York; and the courts of the latter state may recognize such assignment as giving to the purchaser an equitable right of action, which they will enforce as against the debtor, the rights of citizens of New York not intervening.[1] Where, however, citizens of a state, who are creditors of a foreign corporation, have instituted proceedings in attachment against the corporation, and acquired liens upon its property in the state of their residence, receivers of the corporation, appointed in the foreign state, will not be allowed to deprive such creditors of their rights, and the courts will protect the lien acquired by their own citizens, in preference to the claim or right asserted by the foreign receivers.[2]

[1] Hoyt *v.* Thompson, 5 N. Y., 320, reversing S. C., 3 Sandf., 416. "It is a conceded principle," says Ruggles, C. J., "that the laws of a state have no force, *proprio vigore*, beyond its territorial limits. But the laws of one state are frequently permitted, by the courtesy of another, to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy or comity is established not only from motives of respect for the laws and institutions of foreign countries, but from considerations of mutual utility and advantage."

[2] Willitts *v.* Waite, 25 N. Y., 577; Taylor *v.* Columbian Insurance Company, 14 Allen, 353; Hunt *v.* Columbian Insurance Company, 55 Me., 290. The observations of Mr. Justice Barrow, in the case last cited, very clearly illustrate the distinction noticed, as well as the principles on which it is founded. He says, p. 297: "The receivers, who assert this claim here, are merely the servants of the court in New York, having legal authority coextensive only with the jurisdiction of the court by whom they were appointed. Upon principles of comity, often recognized and always acted on, except when they come in conflict with paramount rights of suitors in our courts, they might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But equity does not require us to permit the exercise of such privileges to the detriment of our own citizens, who are pursuing appropriate legal remedies in this court."

§ 48. As between different courts appointing the same person receiver in different actions, it is held that the court first appointing him acquires exclusive control over the fund and the receiver holding it, and it will not permit such control to be interfered with by the subsequent appointment of the same person in another cause, but will in the exercise of its powers proceed to disburse the fund as may be proper.[1] Indeed, when a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of co-ordinate jurisdiction will not entertain a bill to administer the same property, and to take it from the possession of the former receiver, and to appoint its own receiver. In such a case, the parties aggrieved should seek relief in the court which is already in possession of the property through its receiver.[2] So the prior jurisdiction of a court of equity powers over the subject-matter of the appointment of a receiver, and the pendency of a motion for an injunction and a receiver in such court, exclude the interference of that court in a subsequent suit for the same relief. And the appointment of a receiver in the suit thus subsequently begun will be held inoperative as against the appointment made in the former cause.[3] And a receiver being an officer of court, and being bound to account to the court appointing him for all funds which he receives in his official capacity, he can not be compelled by an order of another court to pay over money in his hands as receiver in satisfaction of an execution issued upon a judgment of such other court, since such a procedure would necessarily have the effect of producing a conflict of jurisdiction, and would prevent the receiver from compliance with the obligations of his bond given to the court appointing him.[4]

§ 49. Under the New York code of procedure, the ap-

[1] O'Mahony v. Belmont, 37 N. Y. Supr. Ct. R., 380.

[2] Young v. M. & E. R. Co., 2 Woods, 606.

[3] Young v. Rollins, 85 N. C., 485.

[4] Nelson v. Conner, 6 Rob. (La.), 339.

pointment of a receiver, like the granting of an injunction, is considered as one of the provisional remedies of the courts, the two remedies being regarded as of equal weight and importance. And since the courts of that state, under the code, are regarded as having acquired jurisdiction of a cause, and as having control of all the subsequent proceedings, from the time of service of process, or the allowance of a provisional remedy, the granting of an injunction by a court of competent jurisdiction is a bar to appointing a receiver in a subsequent proceeding between the same parties in another court; and the court first moving having acquired control by the granting of an injunction, the second court will decline to interfere by a receiver, or to take jurisdiction of the cause.[1]

[1] McCarthy *v.* Peake, 18 How. Pr., 138; S. C., 9 Ab. Pr., 164.

II. Relative Powers of State and Federal Courts.

§ 50. Questions of considerable delicacy and importance have frequently arisen under our peculiar judicial system, touching the relative powers of the state and federal courts in the appointment of receivers over the same subject-matter in litigation in both tribunals. These questions have usually been determined upon principles of comity, and it is now the established doctrine of both the state and federal courts, that that court, whether state or federal, which first acquires jurisdiction of the subject-matter, or of the *res*, and which is first put in motion, will retain its control to the end of the controversy, and the possession of its receiver will not be disturbed by the subsequent appointment of a receiver by the other court.[1] Nor is it necessary, in the ap-

[1] Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101; Bill *v.* New Albany, etc., R. Co., 2 Biss., 390; Union Trust Co. *v.* The Rockford, Rock Island & St. Louis R. Co., U. S. Circuit Court, Northern District

plication of the general doctrine here stated, that the court asserting its exclusive control by reason of having been first to take cognizance of the subject-matter, should be the first to take actual possession of the property by its receiver.[1] And where, subsequent to the filing of a bill for a receiver in a creditor's suit in a federal court, but before the appointment in that court, a bill is filed and a receiver is appointed in a state court, the federal tribunal will refuse to recognize the receiver of the state court, or to rescind its own appointment, even though the bill as originally filed in the federal court was imperfect, and was amended subsequent to the appointment of the receiver by the state court.[2]

of Illinois, 7 Chicago Legal News, 33; Gaylord *v.* Fort Wayne, Muncie & Cincinnati R. Co., U. S. Circuit Court, District of Indiana, unreported, decided by Drummond, J., 1875; Sedgwick *v.* Menck, 6 Blatchf., 156; S. C., 1 Bank. Reg., Second Edition, 675; Alden *v.* Boston, Hartford & Erie R. Co., 5 Bank. Reg., 230; Storm *v.* Waddell, 2 Sandf. Ch., 494; Watkins *v.* Pinkney, 3 Edw. Ch., 533; Spinning *v.* Ohio Life Insurance & Trust Co., 2 Disney, 336; Hutchinson *v.* Green, 6 Fed. Rep., 833; May *v.* Printup, 59 Ga., 129. And see Beecher *v.* Bininger, 7 Blatchf., 170; *In re* Clark and Bininger, 4 Benedict, 88; Eisenmann *v.* Thill, 1 Cincinnati Sup. Ct. R., 188; Conkling *v.* Butler, 4 Biss., 22; Bruce *v.* M. & K. R. R., 19 Fed. Rep., 342. But see Merchants' & Planters' National Bank *v.* Trustees, 63 Ga., 549. And in South Carolina R. Co. *v.* People's Saving Institution, 64 Ga., 18, it is held that the pendency of a bill in a federal court in another state to foreclose a railway mortgage and for a receiver will not interfere with the operation of the attachment laws, when the attachments are levied before a receiver is appointed in the former suit.

[1] Union Trust Co. *v.* The Rockford, Rock Island & St. Louis R. Co., U. S. Circuit Court, Northern District of Illinois, 7 Chicago Legal News, 33; Gaylord *v.* Fort Wayne, Muncie & Cincinnati R. Co., *infra.*

[2] Gaylord *v.* Fort Wayne, Muncie & Cincinnati R. Co., U. S. Circuit Court, District of Indiana, unreported, decided by Drummond, J., 1875. "The principle upon this subject," says Drummond, J., "is properly stated in the opinion of the circuit court of the northern district of Illinois, in the case of the Rockford, Rock Island & St. Louis Railroad Company, reported in the 7th Chicago Legal News, 33: that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession or control of the *res,* the subject-matter of the controversy, to the exclusion of all interference from other courts of concurrent jurisdiction; and that the proper application of

§ 51. The doctrine under consideration has been frequently applied in cases where proceedings in bankruptcy have been instituted against a defendant debtor in the United States courts, subsequent to the appointment of a receiver over the debtor's effects in a state tribunal, and in such cases the state courts have uniformly insisted on main-

this principle does not require that the court which first takes jurisdiction of the controversy shall also first take the actual possession of the thing in controversy. Then the question is as to the application of this rule or principle to the present case. It is insisted that because the bill was amended, and, between the date of the filing of the bill and the amendment, another creditor instituted a suit in the state court, and had a receiver appointed who took possession, therefore this court lost jurisdiction of the *res*, and could not permit imperfect allegations to be amended, and thereby affect the assumed right of the state court over the *res*. The only question that arises in this aspect of the case is whether the federal court had jurisdiction; if it had, then the principle applies that no other court of concurrent jurisdiction could interfere with the *res*, which was the subject-matter of the controversy. It is to be presumed that each court would equally protect the rights of the creditors of the defendant. The only question is, which court has first obtained jurisdiction and has the right to call upon creditors to come before it for the protection of their rights. In deciding this question we have to lay down a rule which would apply to both courts, state and federal; and by which we would be bound if the state court first obtained jurisdiction of the *res*, and by which the state courts should also be bound when the federal court first obtained jurisdiction; and we are not prepared to hold that, because the allegations in the bill are imperfectly stated, because an amendment is made to the bill, that thereby the court loses jurisdiction of the subject-matter. All amendments germane to the bill and allowed by the court relate back to the time when the bill was filed, and are considered as incorporated in, and a part of, the original bill. And it can not affect the question that the amendment asks that the receiver shall do something else, as by adopting a change in the manner of administering the assets. We think that there is no other safe rule to adopt in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled. Where a bill is filed, the object of which is to obtain payment of a judgment out of the assets of the defendant, if the assets are withdrawn from the court by another court, of course the object of the bill can never be obtained: there is really nothing about which there can be litigation. The continuance, therefore, of a suit under such circumstances would be useless. The

taining their jurisdiction and disposing of the assets.[1] Thus, where a receiver was appointed upon a judgment creditor's bill in a state court, and the appointment was completed and the debtor's property vested in the receiver, but the debtor filed his petition in bankruptcy subsequent to the filing of the creditor's bill, and was adjudicated a bankrupt subse-

only relief that the party could have would be to follow the property to the other court. Whether or not in a race among creditors against an insolvent party, where bills are filed in courts of concurrent jurisdiction, and a receiver is asked to take possession of the property, the receiver who first obtains actual possession, without regard to the time when the court took jurisdiction of the case, should retain possession, is a very serious question. It was held by the circuit court of the northern district of Illinois, in the case already referred to, that it was not material that a receiver appointed by the state court had first taken actual possession of the property, provided the federal court had the prior right to control the *res*. We think that decision was right; otherwise, in the case supposed, when a bill is filed in one of the courts, and an application made for the appointment of a receiver, and the case presented to the court, and argued and considered by the court, and a receiver appointed, at any time before the receiver takes actual possession of the property, another creditor can go into another court, make his application, have the appointment made, and the receiver take possession of the property. This would seem to be in violation of the principle which has been so often sanctioned by the decisions, that that court which first takes cognizance of the controversy, and incidentally of the *res*, has the right to proceed and terminate the litigation. This being so, it becomes simply a question of jurisdiction, not a question whether or not the case of the plaintiffs is perfectly stated. Defects can be supplied, and the jurisdiction of the court not affected. Suppose that, upon an application to a court of equity for relief by a creditor against an insolvent estate, an omission were made in the bill that an execution was issued and returned *nulla bona;* if the fact were so, that defect might be supplied, and it would not affect the right of the court to proceed and give relief; so with the omission of any other allegation not affecting the question of the jurisdiction of the court over the subject-matter. Of course, in all that has been said it is assumed, what was the fact in this case, that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court."

[1] Storm *v.* Waddell, 2 Sandf. Ch., 494; Watkins *v.* Pinkney, 3 Edw. Ch., 533. See, also, Eisenmann *v.* Thill, 1 Cincinnati Sup. Ct. R., 188; Spinning *v.* Ohio Life Insurance and Trust Co., 2 Disney, 336.

quent to the appointment of the receiver, it was held that the assignee in bankruptcy took only such interests as the debtor had when the assignee was appointed, and therefore took the debtor's property subject to the lien acquired by the creditor's suit; and the receiver was, therefore, directed to pay the funds realized from the property to the plaintiff in the creditor's suit, rather than to the assignee in bankruptcy.[1] So where a receiver had been appointed in a creditor's suit, and after the filing of the creditor's bill the defendant debtors filed their petition in bankruptcy in the federal court, it was held that the jurisdiction acquired by the latter court by the mere filing of the petition did not oust the previously acquired control of the state court over the debtors' property, and that it was at liberty to go on and operate upon the defendants and their property until it became vested by assignment in their assignee in bankruptcy. And without passing upon the right of the judgment creditor in the state court to ultimately maintain his lien upon the debtors' property, as against the assignee to be subsequently appointed in bankruptcy, it was held that defendants should transfer their property to the receiver, notwithstanding the filing of their petition in bankruptcy.[2] And when

[1] Storm *v.* Waddell, 2 Sandf. Ch., 494.

[2] Watkins *v.* Pinkney, 3 Edw. Ch., 533. This was a motion for an attachment against defendants in a creditor's bill, for refusing to execute an assignment of their property to a receiver, the grounds of refusal being that, since the filing of the creditor's bill, defendants had filed their petition in bankruptcy. McCoun, Vice-Chancellor, says, p. 534: "The question is, whether the court of chancery, under such circumstances, will proceed to compel a transfer and delivery of property of the bankrupt to a receiver, for the benefit of a particular judgment creditor. I thought proper, as it was somewhat a novel question, to confer on the subject with the learned judge of the United States district court, in order to ascertain his views and to avoid anything like collision with the United States courts in the exercise of their jurisdiction under the bankrupt law. The act of congress becomes the paramount law, to which this court is bound to give effect, even where it comes in contact with the statute of the state. The ground taken by the defendant is, that the moment a party presents his petition in bankruptcy to a court of the United States, that

the state court has been the first to acquire control over the subject-matter, and has appointed its receiver, who has taken charge of the property in controversy, a receiver subsequently appointed by the United States court may be

moment he ousts the jurisdiction of the state courts over him and his property, and gives to the United States courts sole and entire jurisdiction to pass what property he has at the time of presenting his petition, to the assignee to be appointed under the act. But I find that the judges of the United States courts are not disposed to give such an effect to the bankrupt law, because it is in the power of the bankrupt to withdraw his petition; and if he could, by merely presenting his petition, defeat the state court, he could at any time afterwards withdraw it, and thus defeat the operation also of the bankrupt law. The jurisdiction which the district court acquires on the presentation of a bankrupt's petition is not, therefore, such as to defeat proceedings which may have been commenced against him in this court by creditor's bill and which is pending at the time he presents his petition. This court is to go on and operate upon the defendant and his property until such time as he shall make his assignment; and thus vest it in the assignee in bankruptcy under the decree of the United States court. This proceeding is, nevertheless, subject to all questions that may arise under the bankrupt law, between the receiver appointed by this court or the creditors prosecuting here, and the assignee in bankruptcy. It does not follow, from anything expressed in the act of congress, that the proceedings in bankruptcy are to interfere with the proceedings *in rem* against a debtor in the state courts. They may, therefore, go on without being considered as coming in collision with the United States courts under the bankrupt law. But after the debtor's property has been passed by decree to the assignee in bankruptcy, this assignee can bring an action against the party who has got possession of the property of the debtor under the proceedings here, and the question will come up in such action, or by petition, either to the United States court or to this court, and it will then be determined whether the bankrupt law is to distribute, or the particular creditor is to have the benefit of it. In the English courts, actions are very frequently brought by assignees of bankrupts' estates to recover property which has got into the hands of a creditor or other person to whom the debtor had no right to make an assignment. The question now before this court is merely one in relation to the manner of proceeding, and whether this court is to withhold its jurisdiction and say, 'we have no jurisdiction in the case; the debtor has presented his petition to a court of the United States, and we have no further jurisdiction in the matter.' It remains, however, yet to be determined whether the jurisdiction which the court of chancery had is taken away. And, until it is de-

punished for contempt if he interferes with the receiver previously appointed by the state court.[1]

§ 52. The federal courts have generally recognized the doctrine under discussion, and have almost uniformly conceded the jurisdiction of the state tribunals when the latter have first acquired control over the subject-matter and the parties, or when the receiver of the state court has first acquired possession of the assets, even when the conflict of jurisdiction has been presented to the United States court in the course of proceedings in bankruptcy there. And the undoubted weight of authority in the federal courts supports the proposition that when the state courts have properly acquired control over the subject-matter in controversy, and have appointed receivers who are in possession of the property or fund at the time of instituting proceedings in bankruptcy, the United States courts will not interfere with the jurisdiction already acquired by the state courts, but will respect the title of their receivers and their right to manage and control the property, at least until it is impeached for some cause for which it is impeachable under the bankrupt act. The jurisdiction of the state court having properly attached, and its right to appoint receivers not being questioned, the property of defendants is regarded as being lawfully in possession of that court by its

termined, the court of chancery will go on with this proceeding, but without prejudice to the rights of the assignee in bankruptcy to be hereafter appointed. Whether the creditor can maintain his right to what may pass to the receiver in this cause must be a subject for future consideration; but as a matter of practice here, we must go on without reference to the defendant's proceeding in the district court of the United States. I must, therefore, order that the defendant appear before the master and do what is required of him, and make a transfer of such property as he has and as the master may direct, otherwise the attachment must issue." It was held, however, that if the debtor had been declared a bankrupt, and had delivered his property to his assignee, this would excuse him from making an assignment to the receiver, since the bankrupt court would, in this event, have put it out of his power to make such assignment.

[1] Spinning *v.* Ohio Life Insurance & Trust Co., 2 Disney, 336.

receivers, and the federal court has no such superior jurisdiction or supervisory power over the state tribunal as will warrant it in taking the property out of the receivers' possession, or enjoining them from its management.[1] The bankrupt court will not, therefore, upon the petition of the assignee in bankruptcy, direct its marshal to take the assets out of the hands of the receivers, and it may enjoin the bankrupts from interfering with the property in the possession of the receivers.[2] So when a receiver is appointed by the state court over mortgaged premises, in an action for the foreclosure of a mortgage, he can not be dispossessed by an assignee in bankruptcy subsequently appointed over the mortgagor's estate in the federal court.[3] And when a state court, through its receiver, is in possession of the property of a judgment debtor, who is afterward adjudged a bankrupt by the federal court, the latter court will not sanction the forcible seizure of the property in the receiver's possession and its delivery to the assignee, but will leave the assignee to assert his title by proceedings in accordance with the bankrupt act.[4] So it is held that the assignee in bankruptcy is not entitled to a receiver in the first instance, upon a bill filed by him, to take possession of the bankrupt's property held by receivers appointed in the state court previous to the proceedings in bankruptcy. And the fact that defendants in such suit, as receivers of the state court, assert a prior jurisdiction acquired by that tribunal, and

[1] Sedgwick *v.* Menck, 6 Blatchf., 156; S. C., 1 Bank. Reg., Second Edition, 675; Beecher *v.* Bininger, 7 Blatchf., 170; Alden *v.* Boston, Hartford & Erie R. Co., 5 Bank. Reg., 230; *In re* Clark & Bininger, 4 Benedict, 88; Davis *v.* The Railroad Company, 1 Woods, 661. But see, *contra*, *In re* Merchants' Insurance Co., 3 Biss., 162; Platt *v.* Archer, 9 Blatchf., 559.

[2] *In re* Clark & Bininger, 4 Benedict, 88.

[3] Davis *v.* The Railroad Company, 1 Woods, 661.

[4] *In re* Hulst, 7 Benedict, 17. But in such case, in an examination before the register in bankruptcy, concerning the affairs of the bankrupt, the receiver may be examined as a witness, and may be compelled to produce the books of the bankrupt for examination. *In re* Hulst, 7 Benedict, 40.

claim thereupon the power of the state court to administer it, constitutes no ground for the interference of the United States court by appointing a receiver *in limine*, especially when it is not shown that the property is in peril of waste or loss in custody of the state court, or that the receivers are violating their duty, or that they are irresponsible or threaten the removal of the property.[1] And an action can not be maintained in the United States courts in behalf of an assignee in bankruptcy, to compel a receiver appointed by a state court in a creditor's suit, before the proceedings in bankruptcy, to deliver up the property of the debtor to the assignee.[2] It would seem, however, to be otherwise when the proceedings in the state court are entirely unauthorized and void, and in such case the decree of the state court appointing a receiver is held to constitute no defense to an action by the assignee against the receiver concerning the property.[3]

§ 53. While, as is thus shown, the federal courts sitting in bankruptcy have generally recognized the jurisdiction of the state tribunals, and the possession of their receivers, when acquired previous to the bankruptcy proceedings, there have been cases holding a contrary doctrine, and insisting upon the exclusive control of the federal court, even though the state court had first acquired jurisdiction, and though its receiver was first in possession. Thus, it has been held that the appointing of a receiver over an insolvent corporation by a state court, under proceedings instituted by the attorney-general of the state for the dissolution of the corporate body, in conformity with the laws of the state, was a "taking on legal process," within the meaning of the thirty-ninth section of the national bankrupt act of 1867; and that such a case did not present a question of concurrent jurisdic-

[1] Beecher *v.* Bininger, 7 Blatchf., 170. See, *contra*, Platt *v.* Archer, 9 Blatchf., 559, where the assignee was himself appointed receiver in such a case.

[2] Sedgwick *v.* Menck, 6 Blatchf., 156; S. C., 1 Bank. Reg., Second Edition, 675.

[3] Buchanan *v.* Smith, 16 Wal., 309; S. C., 7 Bank. Reg., 513.

tion between the state and federal tribunals, since the exclusive jurisdiction of the United States court attaches whenever insolvency intervenes, so as to render the debtor a proper subject for the operation of the bankrupt act. And while, in such case, the federal court may recognize the proceedings in the state court, so far as the jurisdiction there is attempted to be exercised for the dissolution of the corporation, it is held that it can not allow the receiver of the state court to retain control of the assets of the corporation, since the federal tribunal exercises exclusive jurisdiction in cases of bankruptcy.[1] So where a creditor of an insolvent insurance company had instituted proceedings to obtain a receiver in a state court, and to set aside an assignment by the company of all its property to a trustee, and before the state court had taken any action in the matter a bill was filed in the federal court by non-resident creditors for the same relief, that court took jurisdiction and appointed a receiver, notwithstanding the pendency of the action in the state court.[2] The doctrine of the cases here cited, however, is plainly repugnant to the weight of authority, as shown in the preceding section.

§ 54. As illustrating the general doctrine under discussion, when a trustee in a deed of trust securing the bondholders of a railway company files his bill for a foreclosure in the federal court, and pending this proceeding, and without leave of this court, he brings an action to foreclose the same trust deed in a state court, where he obtains a receiver and a decree of foreclosure, and sells the property, the United States court nevertheless retains its jurisdiction. It may, therefore, upon a proper showing of the necessity for a receiver, appoint one on the application of a bondholder, the interference of the state court being regarded as unauthorized, and as not affecting the previously acquired juris-

[1] *In re* Merchants' Insurance Co., 3 Biss., 162. And see Platt *v.* Archer, 9 Blatchf., 559.

[2] Buck *v.* Piedmont & Arlington Life Ins. Co., 4 Fed. Rep., 849; S. C., 4 Hughes, 415.

diction of the federal court.[1] Nor will the state courts entertain an action for the foreclosure of a mortgage, or to avoid and set aside a previous foreclosure by the mortgagee, when the mortgaged premises are in the possession of a receiver duly appointed by a United States court having jurisdiction for that purpose, since this would necessarily disturb the possession of the receiver, which is the possession of the court appointing him. In such a case relief should be sought in the federal court, which is the more appropriate forum for determining the rights of the parties, it having already taken possession of the property by its receiver, and being empowered to protect the interests of all parties in the distribution of the mortgage fund.[2]

§ 55. When a state court has acquired jurisdiction of an action against a railway company for the forfeiture of its franchise and for a receiver, and has appointed a receiver and declared the franchise forfeited and the corporation dissolved, a federal court will not entertain a bill against the receiver and the railway company for an accounting, but will leave the person aggrieved to pursue his remedy by applying to the state court, which alone has control over the receiver.[3]

§ 56. Where a business firm is in a condition of actual insolvency, and one partner files a bill in a state court for a dissolution of the firm, and for an accounting and a receiver, his proceeding is regarded as an act of bankruptcy within the meaning of the bankrupt law, the appointment of the

[1] Bill *v.* New Albany, etc., R. Co., 2 Biss., 390. See, also, Union Trust Co. *v.* The Rockford, Rock Island & St. Louis R. Co., U. S. Circuit Court, Northern District of Illinois, 7 Chicago Legal News, 33.

[2] Milwaukee & St. Paul R. Co. *v.* Milwaukee & Minnesota R. Co., 20 Wis., 165. But, in Mercantile Trust Co. *v.* Lamoille Valley R. Co., 16 Blatchf., 324, it was held that the possession of a railway by a receiver appointed in a state court would not bar proceedings for the foreclosure of a mortgage upon the property of the railway in a federal court, and that the latter court might proceed with the foreclosure, but without interfering with the receiver, or with his possession of the property.

[3] Conkling *v.* Butler, 4 Biss., 22.

receiver being a taking of the debtor's property on legal process, and its effect being to delay and defeat the operation of the bankrupt act.[1]

§ 57. Upon a bill by the assignee in bankruptcy of a copartnership to set aside an assignment for the benefit of creditors, made by the firm when in a condition of insolvency, and to restrain the assignees from doing anything under such assignment, it is proper that a receiver be appointed by the bankrupt court to take charge of the property, and hold it for the benefit of all creditors who may have an interest therein.[2]

§ 58. A conflict of jurisdiction between a state and federal court concerning property in controversy, there being actions pending in each tribunal by conflicting claimants to the property, and there being imminent danger of collision between the executive officers of the different courts in the enforcement of the process of their courts, has been held sufficient ground to warrant the federal court in granting an injunction and appointing a receiver over the property, when there was a probability of a bitter and long continued litigation at law, and the property was of a perishable nature and liable to be rendered entirely valueless, unless taken possession of by a receiver and sold.[3]

§ 59. When a receiver of a railway company is appointed by a United States court, and he is charged with the duty of operating the road, and is accountable to the court for the proceeds, such proceeds are beyond control of the state courts, the receiver's possession being the possession of the court appointing him. The state courts, therefore, have no authority to enforce as against such receiver the payment of a judgment recovered against the railway for damages resulting from the killing of cattle, even under a statute of the state providing a process for the enforcement of judgments against railways out of funds in the hands of their

[1] *In re* Bininger, 7 Blatchf., 262.

[2] Sedgwick *v.* Place, 3 Benedict, 360.

[3] Crane *v.* McCoy, 1 Bond, 422.

receivers or agents. The judgment creditor, in such case, should apply to the federal court, either for leave to sue the receiver, or for an order on him to pay the judgment.[1]

§ 60. It has been held in Wisconsin, that a state court might entertain an action against a receiver of a railway appointed by a federal court, and might proceed to judgment therein, without leave of the latter court to bring such action, provided there was no actual interference with the receiver's possession.[2] This doctrine is, however, plainly repugnant to the well-established principle, hereafter discussed, that no action can be maintained against a receiver without leave of the court from which he derives his appointment.[3] And it is not perceived that the rule requiring such permission as a condition precedent to bringing an action against a receiver is in any manner affected by the fact that he may have been appointed by a federal court and the action be brought against him in a state court, or *vice versa*.

§ 61. When a receiver, acting under appointment from a United States court, is in actual possession of property, a state court will not grant a writ of assistance to a subsequently appointed receiver in the state tribunal, to enable him to get possession of the property. The right to possession, under such circumstances, will not be determined upon a mere motion, since the possession of the receiver of the federal court is regarded as that of a stranger, and to be determined only by an action and not upon motion.[4]

§ 62. The fact that a receiver derives his appointment from a United States court does not confer upon him any greater power or privileges in respect to bringing actions in the state courts than if he were appointed by those courts, and the question of comity between the two tribunals will not be considered in such case.[5]

[1] Ohio & Mississippi R. Co. *v.* Fitch, 20 Ind., 498.

[2] Kinney *v.* Crocker, 18 Wis., 74.

[3] See § 254, *infra*, and authorities there cited.

[4] Gelpeke *v.* Milwaukee & Horicon R. Co., 11 Wis., 454, opinion of Dixon, C. J., and Paine, J.

[5] Battle *v.* Davis, 66 N. C., 252.

CHAPTER III.

OF THE SELECTION AND ELIGIBILITY OF THE RECEIVER.

§ 63. A receiver being an impartial person as between the parties, and being the officer and representative of the court in the management and control of the property or fund in controversy, considerable importance attaches to the question of his selection as well as to his qualifications and competency for the management of the trust committed to his charge. The usual course of practice in the English Court of Chancery, with reference to the selection of a

receiver, was to refer the matter to a master in chancery to make the selection. The parties in interest in the cause were then at liberty to appear before the master and to nominate suitable persons for the office, whose qualifications and competency were passed upon by the master, who made the appointment and reported his selection to the court.[1] A similar practice also prevailed under the New York chancery system prior to the adoption of the code of procedure in that state.[2]

§ 64. When the case has been referred to a master in chancery to make the appointment, and he has made his report approving and recommending the appointment of a particular person, his report and approval should stand until the person so recommended is impeached as an improper person.[3] And the courts are exceedingly averse to interfering with the discretion exercised by the master in making his selection; and when, after due investigation, he has made the appointment and reported to the court, it will not interfere with the selection, or entertain exceptions to the appointment, unless some good and substantial objection can be shown.[4] The reason for the reluctance thus manifested

[1] For illustrations of this practice in the English chancery, see Thomas *v.* Dawkin, 1 Ves. Jun., 452; S. C., 3 Bro. C. C., 508; Garland *v.* Garland, 2 Ves. Jun., 137; Anonymous, 3 Ves., 515; Wilkins *v.* Williams, id., 588; Tharpe *v.* Tharpe, 12 Ves., 317; Wynne *v.* Lord Newborough, 15 Ves., 283; Creuze *v.* Bishop of London, 2 Bro. C. C., 253.

[2] See *In re* Eagle Iron Works, 8 Paige, 385.

[3] Creuze *v.* Bishop of London, 2 Bro. C. C., 253; Thomas *v.* Dawkin, 3 Bro. C. C., 508.

[4] Tharpe *v.* Tharpe, 12 Ves., 317; *In re* Eagle Iron Works, 8 Paige, 385; Thomas *v.* Dawkin, 1 Ves. Jun., 452. And see Garland *v.* Garland, 2 Ves. Jun., 137; Anonymous, 3 Ves., 515; Wilkins *v.* Williams, id., 588. In Tharpe *v.* Tharpe, 12 Ves., 317, the master had appointed a receiver of the estate of an infant, upon the recommendation of the only trustee named in the testator's will, who had acted in the management of the estate. Upon exceptions to the master's report as to the appointment, Lord Erskine observed, p. 319, as follows: "The cases cited are built upon principles that are not peculiar to this court. All courts place a degree of discretion in officers appointed for the management of concerns full of detail and complicated circumstances; and those who impeach the judg-

in interfering with the appointment of the master is found in the necessity which exists on the part of the courts of reposing a considerable degree of discretion in the judgment of officers, such as masters in chancery, whom they have appointed for the examination of complicated matters of detail.[1] The court will not, therefore, disturb the appointment made by the master merely because it may be of opinion that a better selection could have been made. And to induce the court to interfere it must either be shown that the person appointed by the master is legally disqualified, or that his situation is such as to render it probable that the interests of the parties to the litigation will not be properly managed if entrusted to his hands.[2] If, therefore, both of the persons proposed to the master for the receivership are, as to character and qualifications, of equal standing, the court will not interfere with the appointment.[3] And while the party complaining of the master's selection will not be precluded from making a special case to be presented impeaching the master's judgment, yet upon the naked allegation that the person rejected by the master was more competent than another, the court will not investigate the particular reason why he preferred the one to the other.[4] If, however, the court is of opinion that the master has not

ment of those officers upon such points must show a reason for the exception. Lord Anvanley, therefore, in Bowersbank *v.* Colasseau, 3 Ves., 164, states truly that the judgment of the master is to be disturbed only upon special grounds, a strong case to show that the person appointed ought not to be receiver, and the court will not enter comparisons. No objection appears to the person appointed in this instance. He is a land surveyor, acquainted with business likely to qualify him for such an office; a fit person, therefore, in that respect. He was recommended to the master by the trustee, in whom the testator reposed this peculiar trust; not selected by the master at his own discretion or pointed out to him by accident. His residence at the distance of fourteen miles only is no objection. The person proposed is, therefore, altogether unexceptionable." And the exceptions were overruled.

[1] Tharpe *v.* Tharpe, 12 Ves., 317.

[2] *In re* Eagle Iron Works, 8 Paige, 385.

[3] Thomas *v.* Dawkin, 1 Ves. Jun., 452; S. C., 3 Bro. C. C., 508.

[4] Anonymous, 3 Ves., 515.

given proper attention to the circumstances of the case in making the appointment, it is proper to require him to revise his report.[1]

§ 65. The considerations stated in the previous section as applicable to the appointment when made by a master in chancery upon a reference, are, of course, equally applicable to the appointment when made by the court itself without a reference. And in all such cases the selection and appointment of a particular person for the receivership, out of several candidates proposed, is regarded as a matter of judicial discretion, to be determined by the court according to the circumstances of the case.[2] The exercise of this, like all other matters of judicial discretion, will rarely be interfered with by an appellate tribunal.[3] And it may be asserted as a general rule, that, to induce an appellate court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is necessary to show some "overwhelming objection" in point of propriety, or some fatal objection upon principle, to the person named.[4] And the fact that there are great disputes and differences between the

[1] Wynne *v.* Lord Newborough, 15 Ves., 283.

[2] Perry *v.* Oriental Hotels Co., L. R., 5 Ch. App., 420; Cookes *v.* Cookes, 2 De G., J. & S., 526; Williamson *v.* Wilson, 1 Bland, 418. See as to personal considerations governing the court in the choice of a receiver, Smith *v.* New York Consolidated Stage Co., 28 How. Pr., 208.

[3] Cookes *v.* Cookes, 2 De G., J. & S., 526; Perry *v.* Oriental Hotels Co., L. R., 5 Ch. App., 420.

[4] Cookes *v.* Cookes, 2 De G., J. & S., 526. This was a motion before the Court of Appeal in Chancery, to discharge an order of the Vice-Chancellor, appointing one of the defendants in an action to carry into execution the trusts of a will, receiver of the rents of the real estate in controversy, without salary. Lord Justice Knight Bruce observes, p. 528: "Upon a mere question of the exercise of discretion in the choice of one out of several candidates, if I may use the expression, proposed before the Vice-Chancellor for the office of receiver, the court will find, according to its old practice and habits, the greatest difficulty in acting against the exercise of that discretion. To induce the court to act in such a case, against the decision of the lower judge by whom the selection has been made, it would be necessary to find some, if I may use the expression, overwhelming objection in point of propriety of choice, or some objection fatal in principle."

parties in interest, one of whom has been appointed receiver, does not of itself constitute sufficient ground for reversing the appointment made by the court below.[1]

§ 66. When, however, the objection urged to the fitness or competency of the person selected by the inferior court is presented as a question of principle, and not one of mere expediency, an appellate tribunal will sometimes interfere with the appointment of the inferior court. Thus, when it is obvious that the person proposed by defendants for the receivership, and rejected, was a proper and unobjectionable person for the management of the estate, and that the appointment of another person would result in injury to the estate by causing very great additional expense, the appointment of such other person may be revoked, and the person proposed by defendants may be appointed.[2]

§ 67. As regards the question of relationship of the person appointed, to either of the parties in interest in the litigation, while the fact of such relationship is not, *per se*, an absolute disqualification for the receivership, yet it must be allowed to have its proper weight in connection with other circumstances. And in a case where the person appointed was the brother of one of the parties to the action and the son of one claiming to be a large creditor, and was admitted by the plaintiff to have taken an active part in the controversy as

[1] Cookes *v.* Cookes, 2 De G., J. & S., 526. Upon this point, Lord Justice Turner observes as follows, p. 531: "Two points have been urged in support of this appeal as questions of principle. First, it is said that there are great disputes and differences in this family, and that it is not for the interest of the estate that this gentleman should be appointed receiver. But if the existence of differences and disputes is to be considered as a question of principle affecting the appointment of a receiver, it is obvious that there could hardly be any case in which it would not be competent to the parties to come here, by way of appeal from the appointment of a receiver; for in cases where receivers are appointed it is almost always in consequence of the differences and disputes between the parties. I think, therefore, that the differences between these parties, unfortunate as they are, furnish no ground whatever for this application."

[2] Perry *v.* Oriental Hotels Co., L. R., 5 Ch. App., 420.

his friend and agent, he was regarded as too much enlisted in the cause to permit him to be as unbiased and impartial as a receiver should be, and was therefore removed.[1]

§ 68. It is regarded as exceedingly objectionable to appoint as receiver a person who is in the interest of the defendant, against whom the appointment is made.[2] But a solicitor not concerned in the litigation is eligible to a receivership, although if appointed he can not act as solicitor in any proceedings which it may be necessary for him to take as receiver.[3] But it is improper to appoint as receiver over a particular kind of property a person who is entirely unfamiliar therewith, even though he gives an undertaking to attend to the directions of another person familiar with the management of the property, since it is always preferable that the receiver appointed should act upon his own responsibility.[4]

§ 69. The fact of the receiver chosen residing at a great distance from the estate or property which is to be subjected to his management and control, while not regarded as an absolute disqualification for the office, is a circumstance which should be taken into consideration in making the appointment.[5] But where the person appointed receiver of an estate was a land surveyor, and well qualified for the management of the property, the fact of his residence at a distance of fourteen miles from the estate over which he was appointed was regarded as no valid objection.[6] And it is not necessary that the person selected should be a resident of the state or jurisdiction in which the suit is pend-

[1] Williamson *v.* Wilson, 1 Bland, 418. As to the circumstances which will justify the appointment of one of the parties to a business transaction, when the parties themselves had agreed that such person should manage and close up the business in question, see Hanover Fire Insurance Co. *v.* Germania Fire Insurance Co., 33 Hun, 539.

[2] Lupton *v.* Stephenson, 11 Ir. Eq., 484.

[3] Wilson *v.* Poe, 1 Hog., 322.

[4] Lupton *v.* Stephenson, 11 Ir. Eq., 484.

[5] Wynne *v.* Lord Newborough, 15 Ves., 283. See 2 Daniell's Chancery Practice, ch. XXXIX, § III.

[6] Tharpe *v.* Tharpe, 12 Ves., 317.

ing. Thus, under the laws of Missouri, a public officer of the state being charged with the duty of instituting proceedings to wind up insolvent insurance companies, and being appointed in that state receiver of the company, the same person was appointed receiver by the federal court in Tennessee, in a subsequent suit instituted by creditors of the company to reach its assets in the latter state.[1]

§ 70. It is important to observe that courts of equity are exceedingly jealous of appointing any person to a receivership whose duty it would otherwise be to watch the proceedings of the receiver, or to call him to an account for his management of the trust.[2] Upon this ground a solicitor under a commission of lunacy, under the English practice, should not be appointed receiver of the estate of the lunatic.[3] And upon similar ground, a solicitor in the cause is not a proper person for the receivership, since no person ought to be allowed to control his own accounts in that capacity.[4] So it is improper to appoint as receiver the law partner of the solicitor for complainant in the cause, since such partner is presumptively as much interested in the proceedings as complainant's solicitor himself.[5] So it has been held that a master in chancery is not a proper person to be appointed, since he is an officer of the court, whose duty it is to examine the receiver's accounts and to check his conduct; and his appointment is ground for reversing the decree.[6] A barrister, however, is competent to act as receiver,[7] and under the English practice barristers are

[1] Taylor *v.* Life Association of America, 3 Fed. Rep., 465. See S. C., on final hearing, 13 Fed. Rep., 493.

[2] Stone *v.* Wishart, 2 Madd., 63, 1st American Edition, 374; Sykes *v.* Hastings, 11 Ves., 363; *In re* Lloyd, 12 Ch. D., 447.

[3] *Ex parte* Pincke, 2 Meriv., 452.

[4] Garland *v.* Garland, 2 Ves. Jun., 137; *In re* Lloyd, 12 Ch. D., 447; Watson *v.* Arundel, Ir. Rep., 9 Eq., 324.

[5] Merchants' & Manufacturers' National Bank *v.* Kent, Circuit Judge, 43 Mich., 292.

[6] Benneson *v.* Bill, 62 Ill., 408; Kilgore *v.* Hair, 19 S. C., 486.

[7] Garland *v.* Garland, 2 Ves. Jun., 137.

very frequently appointed.[1] It has been held, however, that the fact of the barrister selected being in practice in London at a great distance from the estate, coupled with the fact of his being a member of parliament, while not an absolute disqualification, should have been considered by the master in making the appointment.[2] And in England, a receiver will not be appointed who is not subject to the ordinary process of the courts by commitment, and against whom the same remedies are not available as against a common citizen. A peer of the realm is, therefore, not a competent person to be appointed.[3] And, unless under special circumstances, as in partnership cases in some instances, a party to the cause will not ordinarily be appointed, without the consent of the other party.[4]

§ 71. While there are some reported cases in which the courts have appointed their own clerks as receivers, yet a clerk of a court is not by virtue of his office a receiver of the court, his functions being entirely distinct from those of receiver.[5] The same distinction is recognized where the offices of clerk and of master in chancery are combined in one and the same person. In such case the court can no more compel him to take upon himself the office of receiver in a given case, than it can compel any private citizen to assume such duties. And where the court has ordered that the receiver in a cause deliver over to the clerk and master the funds of the receivership, and that the clerk and master be appointed receiver, such order will not have the effect of making him the receiver, where nothing is done by him in that capacity, and no facts appear from which an inference of his acceptance can be drawn.[6]

[1] 2 Daniell's Chancery Practice, ch. XXXIX, § III.

[2] Wynne *v.* Lord Newborough, 15 Ves., 283.

[3] Attorney-General *v.* Gee, 2 Ves. & Bea., 208.

[4] *In re* Lloyd, 12 Ch. D., 447.

[5] Hammer *v.* Kaufman, 39 Ill., 87; Waters *v.* Carroll, 9 Yerg., 102; Kerr *v.* Brandon, 84 N. C., 128; Rogers *v.* Odom, 86 N. C., 432.

[6] Waters *v.* Carroll, 9 Yerg., 102.

§ 72. In compulsory proceedings against corporate bodies for the appointment of receivers, the selection of a proper person for the receivership is a question of much delicacy and grave importance. In this class of cases, it is regarded as manifestly improper to appoint an officer of or person connected with the management of the corporation itself to the post of receiver.[1] In such cases the courts act upon the principle that if the officers of the corporation are unfit persons for the management of its affairs in their official capacity, they are equally unfit to be entrusted with such management in the capacity of receivers, and the rule of exclusion may be regarded as based upon sound principles of public policy. Where, therefore, proceedings are instituted in equity against an insolvent banking corporation, under the statutes of the state authorizing the appointment of receivers of insolvent corporations for the winding up of their affairs, the court will not appoint an officer of the bank the receiver in the cause.[2] And when, in proceedings against a corporation for the appointment of a receiver, the person selected for the trust was the secretary and treasurer of the company, as well as its legal adviser and counselor, and was also the largest single creditor of the corporation, and was the legal adviser of the complainant, and drew the bill in the cause, he was held to be totally disqualified for the position.[3] So the vice-president of an insolvent life insurance

[1] Attorney-General *v.* Bank of Columbia, 1 Paige, 511; Baker *v.* Administrator of Backus, 32 Ill., 79; Freeholders *v.* State Bank, 28 N. J. Eq., 166; McCullough *v.* Merchants' Loan & Trust Co., 29 N. J. Eq., 217. But see *In re* Fifty-four First Mortgage Bonds, 15 S. C., 304.

[2] Attorney-General *v.* Bank of Columbia, 1 Paige, 511. And see as to considerations governing the court in the appointment of a receiver of a large banking corporation, whose assets are of great value, *In re* Empire City Bank, 10 How. Pr., 498.

[3] Baker *v.* Administrator of Backus, 32 Ill., 79. The court say, p. 112: "It seems that the secretary and treasurer of the company was A. C. Coventry, a lawyer by profession, and its counselor and adviser. He was, too, the largest single creditor of the company, having claims against it exceeding $3,000. He was the adviser, also, of the complainant, Baker, whom the defendant in error represents,

company, to whom it has assigned all its effects in trust for the benefit of its creditors, is not regarded as a proper person to be appointed receiver over the company in an action to set aside such assignment.[1] If, however, the laws of the state providing for the voluntary dissolution of insolvent corporations authorize the appointment of any of the officers or stockholders of the corporation as receivers, it is proper to appoint the president and book-keeper of the corporation, when not otherwise disqualified, and when it is not shown that their conduct or management of the business has in any manner tended to produce the insolvency of the company.[2]

§ 73. Upon proceedings in equity against an insolvent corporation for the winding up of its affairs, and the appointment of a receiver, the person selected for the trust need not necessarily be an individual person, and a corporate body may itself be appointed receiver of another corporation upon the insolvency of the latter. And this is permissible, even though the corporation selected for the office has previously recovered a judgment in its capacity of receiver of a former insolvent corporation, against the defendant, so that it is to this extent a creditor of the defendant; there being no unbending rule of law that one who is a

and drew the bill in the cause. He was, without having disclosed these facts to the court, appointed the receiver of all the property of the company, and without trying the market with it by an offering at public sale, he privately sold it, one day after he was appointed, and had his claim against the company fully paid out of the proceeds." . . . "There was no necessity to appoint a receiver, because no fraud is alleged or shown, and no sufficient proof that such a step was necessary to save the property from material injury, or rescue it from impending destruction. And there was a fatal objection to the person appointed receiver. He was not disinterested; he was the legal adviser of the complainant, and framed the bill; he was the legal adviser of the company; he was the largest single creditor; all these disqualified him, and he should not have been appointed."

[1] Buck *v.* Piedmont & Arlington Life Insurance Co., 4 Fed. Rep., 849.

[2] *In re* Eagle Iron Works, 8 Paige, 385, affirming S. C., 3 Edw. Ch., 385.

creditor of an insolvent institution is incompetent to act as its receiver.[1]

§ 74. As a general rule, courts of equity are averse to appointing as receivers persons who occupy relations of trust toward the property or estate which is the subject of the receivership. And a trustee or executor, appointed by a testator for the management of his estate, is usually regarded as an improper person to be appointed receiver of the estate.[2] And this is true regardless of whether he is a sole trustee, or whether there are others joined with him as co-trustees under the will of the testator.[3] The reason for

[1] *In re* Knickerbocker Bank, 19 Barb., 602. The Knickerbocker Bank being insolvent, the United States Trust Company was appointed receiver. This company had previously, as receiver of the Knickerbocker Savings Institution, recovered a judgment against the Knickerbocker Bank. The Trust Company, being the receiver of both institutions, and thus representing both debtor and creditor, applied to the court for instructions as to the course it should pursue. The court, Mitchell, J., say, p. 603: "If the appointment of receiver was only for the purpose of suit on behalf of the Savings Institution, there would be a manifest impropriety in making the Trust Company, acting for that institution, receiver also of the bank. But this was not the case. The receiver of the bank was to act for all the creditors of the bank, and was disinterested, except as to the one claim of the Savings Institution. The Trust Company was specially created by the legislature, in part to aid suitors and the court by assuming the exercise of trusts when it might be difficult to get others to execute them (as in this case), on account of the largeness of the amount of security that would be required, and the difficulty of obtaining persons competent to give such security, and to manage such affairs. More skillful persons to take charge of a trust like this, or more trustworthy, probably could not be found. The papers on the appeal show no objection to them; nor that any others were even named. And as there is no unbending rule of law that one who is a creditor of an insolvent institution shall not be its receiver, the objection to the receiver falls to the ground. The Trust Company being lawfully appointed receiver, and deriving its appointment from the court, or from a justice of the court, it had a right to apply to the court for instructions. And in no case could it be more proper for the receiver to make the application than when it was the representative of both creditor and debtor."

[2] Sutton *v.* Jones, 15 Ves., 584; ——— *v.* Jolland, 8 Ves., 72; Sykes *v.* Hastings, 11 Ves., 363.

[3] ——— *v.* Jolland, 8 Ves., 72.

this aversion to the appointment of such persons to receiverships is found in the fact that the court, in this class of cases, expects the trustee to watch the proceedings with an adverse eye, and to see that the receiver does his duty.[1] The rule rejecting such persons is, however, not inflexible, and when it is apparent, considering the trustee's knowledge of and familiarity with the estate in litigation, that its best interests will be promoted by his appointment, a departure from the rule is allowed.[2] But it is held in such cases that the trustee can only be allowed to act as receiver, upon condition that he shall derive no emolument from the office.[3] As illustrative of when such a departure from the rule is permissible, it was held, where a testator had appointed as trustee and executor of his will a person who had for many years acted as receiver of certain of his property, that he was a fit person to be continued as receiver for the protection of an infant tenant for life.[4]

§ 75. It has been shown in the preceding section that the reason for the refusal of the courts to appoint as receivers persons occupying fiduciary relations to the subject-matter of the receivership is based upon the necessity of their watching the proceedings of the receiver adversely, and holding him to a strict account in the performance of his duties. The same reasoning is applicable to the case of a bill filed by the next friend of infants, against the executors of their estate, for an accounting and a receiver. And in such a case the next friend will not be appointed, since it is his duty to watch the accounts and scrutinize the conduct of the receiver, and the two characters are regarded as so incompatible with each other that the court will not permit them to be combined in one and the same person.[5]

§ 76. An apparent exception to the rule that trustees are ineligible as receivers over the subject-matter of their trust,

[1] Sykes *v.* Hastings, 11 Ves., 363.

[2] Hibbert *v.* Jenkins, cited in Sykes *v.* Hastings, 11 Ves., 363; Newport *v.* Bury, 23 Beav., 30.

[3] Hibbert *v.* Jenkins, 11 Ves., 363.

[4] Newport *v.* Bury, 23 Beav., 30.

[5] Stone *v.* Wishart, 2 Madd., 63, 1st American Edition, 374.

has been recognized in the case of a mortgagee of real estate, occupying the relation of a trustee of the equity of redemption. And such mortgagee has been appointed receiver of the mortgaged premises, but his position and duties as receiver were held to be paramount to those as mortgagee, and his interest in the latter capacity was held to be subordinate to his duties as receiver.[1]

§ 77. The position of a receiver of the estate and effects of a debtor, appointed under proceedings in a state court, is regarded as incompatible with that of a trustee or assignee of the estate of the same debtor in bankruptcy. And when proceedings in bankruptcy are subsequently instituted against the debtor in the federal court, the latter tribunal will not permit the receiver of the state court to be elected assignee or trustee of the bankrupt's estate.[2]

§ 78. In partnership cases, the administrator of a deceased partner, if a fit person in other respects, may be appointed receiver of the firm assets, when the surviving partners are guilty of laches and waste in the settlement of the business. For while, primarily, such administrator has no rights in the settlement and adjustment of the partnership affairs, yet if there be unreasonable delay in the performance of this duty by the surviving partners, it becomes the right and duty of the administrator of the deceased partner to file a bill for an accounting and a receiver, and he himself may then be appointed upon giving additional bond with proper security.[3]

§ 79. Where the bill prays for the appointment of a particular person as receiver, and such person is appointed by the court, it does not necessarily follow that he was appointed solely because recommended in the bill. And in such case, on appeal to a court of last resort, it will be presumed that the court below acted upon its own judgment in

[1] Bolles *v.* Duff, 54 Barb., 215.

[2] *In re* Stuyvesant Bank, 5 Benedict, 566; S. C., 6 Bank. Reg., 272.

[3] Miller *v.* Jones, 39 Ill., 54.

making the selection.[1] But in the Irish Chancery, it is said to be contrary to the practice of the court to appoint as receiver a particular person who is nominated by consent of the parties.[2]

§ 80. The interest of a stockholder and director in a banking corporation, which was the plaintiff in the action, has been regarded as sufficient to disqualify him for the post of receiver. Although in such case, where the interest was not known to the court at the time of appointment, and he had entered upon his duties and spent much time in familiarizing himself with the property, and no misconduct or impropriety was shown, he was allowed to continue in office until a new reference could be had to a master, to make a new appointment.[3]

§ 81. Notwithstanding the general doctrine regarding receivers as impartial persons between the parties, and not interested in the result of the cause, there may be circumstances justifying the appointment of a party in interest. And a mortgagee of estates located in the West Indies was, in one case, deemed a proper person to be appointed in England as receiver of the mortgaged property, and without requiring him to give the usual security.[4]

[1] Johns *v.* Johns, 23 Ga., 31.

[2] Leach *v.* Tisdal, 4 Ir. Ch., N. S., 209.

[3] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 366.

[4] Davis *v.* Barrett, 13 L. J., N. S. Ch., 304.

CHAPTER IV.

OF THE PRACTICE.

I. General Rules of Practice.

§ 82. In a general treatise upon the law of receivers, it is neither expedient nor desirable to present in detail the practice prevailing in the different states in administering this species of relief, since this, like most other questions of

practice, is largely regulated by statute and usage in the different states. Indeed, it is practically impossible to reduce to a harmonious system of rules all questions of practice relating to the appointment of receivers, since the practice and procedure in administering equitable relief are widely divergent in the various states. Some general principles, however, which are believed to be recognized by most of the courts may be deduced from the authorities, and their presentation will occupy the following chapter.[1]

§ 83. The usual practice, both in England and America, is to appoint receivers only upon bills filed for that purpose, and as a general rule the courts will not grant the relief merely upon petition, when no cause is actually pending and no bill filed to give the court jurisdiction, unless in very special cases of emergency.[2] And since a suit in chancery is not begun until the filing of the bill, if a receiver is appointed upon an *ex parte* application before the bill is filed, the appointment will be revoked upon appeal, without considering the merits of the application.[3] And it

[1] In California, it is held, under the statutes of the state, that a judge at chambers has power to appoint a receiver, and upon an *ex parte* application. Real Estate Associates *v.* Superior Court, 60 Cal., 223. In Virginia, the power to appoint a receiver in a judgment creditor's suit is incidental to the power of granting an injunction; and since a judge may grant an injunction in vacation, he may also appoint a receiver in vacation. Smith *v.* Butcher, 28 Grat., 144. The appointment of a receiver in vacation is not warranted by the statutes of Illinois prescribing the powers which may be exercised by circuit judges in vacation. Therefore, an order of a state court appointing a receiver over a railway in vacation is a nullity, and the seizure of the property by a receiver subsequently appointed in a federal court is no interference with the state court. Hammock *v.* Loan and Trust Co., 105 U. S., 77. In Indiana, it is held that, under the code of procedure, the courts have the same power to appoint receivers, and for the same purposes, as pertained to courts of equity prior to the adoption of the code. Bitting *v.* Ten Eyck, 85 Ind., 357. And see this case as to the practice and procedure in appointing receivers in Indiana. To the same point, see Hursh *v.* Hursh, 99 Ind., 500.

[2] *Ex parte* Mountfort, 15 Ves., 445; Leddel's Executor *v.* Starr, 4 C. E. Green, 159.

[3] Crowder *v.* Moone, 52 Ala., 220.

has been held in England, that the court has no power to appoint a receiver upon the application of a defendant in a cause, even though the plaintiff, after filing his bill for a receiver against the defendant, refuses to move for a receiver and opposes defendant's application.[1] It is not, however, indispensable that the bill should contain a specific prayer for a receiver, if the facts stated are sufficient to justify the appointment, since the necessity for the relief frequently occurs after the filing of the bill.[2] And a receiver may be appointed at the final hearing, even though the bill contains no prayer for such relief.[3]

§ 84. It is irregular to appoint a receiver when no motion for that purpose has been made, and no proof adduced showing a necessity for the relief. And the motion should properly be founded on affidavits or papers, copies of which should be served with the notice of the application; although if the papers on which the moving party seeks the relief are already on file in the cause, it is sufficient to refer to them in the notice.[4] But a receiver should not be appointed against a person not before the court, and not made a party to the action in which the appointment is sought.[5]

§ 85. Upon an application for a receiver after the coming in of the answer, it is proper for the court to permit affidavits to be read in behalf of plaintiff, since the object of the court is to be informed of the true circumstances of the case, in order that it may act advisedly upon the applica-

[1] Robinson v. Hadley, 11 Beav., 614. But upon a bill by a second mortgagee for a foreclosure, a defendant, who was a prior mortgagee, has been allowed a receiver against the mortgagor also joined as defendant. Henshaw v. Wells, 9 Humph., 568.

[2] Henshaw v. Wells, 9 Humph., 568; Ladd v. Harvey, 21 N. H., 514; Malcolm v. Montgomery, 2 Mol., 500; Commercial and Savings Bank v. Corbett, 5 Sawyer, 172. But see Augusta Ice Manufacturing Co. v. Gray, 60 Ga., 344.

[3] See observations of the Vice-Chancellor in Osborne v. Harvey, 1 Y. & C. C. C., 116; Merrill v. Elam, 2 Tenn. Ch., 513. See, also, Bowman v. Bell, 14 Sim., 392.

[4] Hungerford v. Cushing, 8 Wis., 320.

[5] Gravenstine's Appeal, 49 Pa. St., 310.

tion.[1] In the Irish Chancery, upon a motion for a receiver on bill and answer, affidavits may be read in behalf of plaintiff in reply to the answer, in explanation of a doubtful passage therein, which does not disclose the whole truth to the court, the affidavit disclosing all the facts.[2]

§ 86. The fact that the bill on which an injunction and a receiver are sought is multifarious, or that it is liable to objection because of misjoinder of parties, constitutes no sufficient objection to a motion for a receiver. Nor is it a sufficient answer to the application that the record is incomplete in particulars, or not in such shape as may be necessary to enable the court to administer complete justice between the parties.[3]

§ 87. The order of appointment should distinctly state upon its face over what property or fund the receiver is appointed, in order that persons dealing with him may know what property is in possession of the court by its officer.[4] And an order appointing a receiver of the "incomes of the outstanding trust property in the pleadings mentioned," is not sufficiently distinct and explicit within the meaning of the rule.[5]

§ 88. It is not regarded as necessary or essential to the appointing of a receiver that the facts upon which the application is based should be set forth in the pleadings, but it is sufficient if they are presented to the court by affidavit upon the hearing of the motion. Indeed, this would seem to follow necessarily from the very nature of the appointment, which is usually treated as an auxiliary proceeding, and not the ultimate object of the action.[6] But it is not

[1] Ladd *v.* Harvey, 21 N. H., 514.

[2] Bell *v.* M'Loghlin, Flan. & K., 272.

[3] Evans *v.* Coventry, 5 DeG., M. & G., 911, reversing S. C., 3 Drew., 75.

[4] Crow *v.* Wood, 13 Beav., 271; O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 223.

[5] Crow *v.* Wood, 13 Beav., 271.

[6] Hottenstein *v.* Conrad, 9 Kan., 435. This was an action for the settlement of partnership affairs, in which a receiver was appointed upon notice and motion, supported by affidavits. Brewer, J., says, p. 438: "It is objected that the petition contains no averment that

sufficient in the application for a receiver to allege merely the legal conclusions upon which plaintiff relies, and the facts must be averred upon which such conclusions are predicated.[1] And where, under the practice of the state, the appellate court or court of final resort rehears and decides cases upon the merits, upon an appeal from an order granting an injunction and appointing a receiver, copies of the affidavits and testimony upon which the motion was granted should accompany the record.[2] And such affidavits can only be considered by an appellate tribunal, upon an appeal from an order appointing a receiver, when properly incorporated into the record, as by a bill of exceptions.[3]

§ 89. Affidavits upon which the application is based should be distinct and precise in their allegations, especially where fraud is one of the grounds relied upon for the interference of the court. And where a receiver is sought of the affairs of a corporation, mere general allegations, in the affidavits supporting the motion, as to the belief of affiants that great frauds have been committed against the corporation, will not justify the relief, when it is not stated by whom the frauds have been committed, or in what they consist.[4] Where, however, under the laws of a state it is made the duty of the attorney-general, upon the insolvency of a banking corporation, to apply for an injunction and a receiver for the winding up of its affairs, it is not necessary that the information filed by the attorney-general for this

there was danger that the property would be wasted or injured before the answer, or before the trial of the case. Such an averment was entirely unnecessary. The showing of the necessity for a receiver need not be in the petition. The appointment of a receiver is a provisional remedy. It is an auxiliary proceeding. It is not the ultimate end or object of a suit. The statute says, 'a receiver may be appointed . . in the action,' etc. All that the pleadings need disclose is, that the action pending is one of a class in which the statute says a receiver may be appointed."

[1] Heavilon *v.* Farmers' Bank, 81 Ind., 249.

[2] Schlecht's Appeal, 60 Pa. St., 172.

[3] Barnes *v.* Jones, 91 Ind., 161.

[4] Oakley *v.* Patterson Bank, 1 Green Ch., 173.

purpose should be verified by a positive affidavit as to the insolvency of the bank, but it is sufficient that it is alleged upon information and belief, since only the officers of the bank can swear positively as to its condition.[1]

§ 90. Under the English practice, as well as under the chancery practice in New York prior to the adoption of the code of procedure, it was customary to grant an order of reference to a master for the purpose of nominating or appointing a receiver. Under the New York practice, when the matter was referred to a master to report a proper person to be appointed, the appointment was not regarded as complete until confirmed by special order of the court. Where, however, the master was himself directed to appoint the receiver and to take from him the requisite security, no confirmation of the appointment was necessary. In the latter case the master, after approving of the receiver and the sureties offered, took the necessary bond, which he filed with the report of his appointment, stating that he had approved of the bond and that it was duly filed. And upon the filing of such report the appointment was deemed completed and the receiver might at once enter upon his duties. If either party was dissatisfied with the master's appointment, the practice seems to have been to present his objections to the court by a petition, upon due notice to all parties in interest, praying that the master might review his report.[2] Under the English practice, when a reference was had to a master with directions to appoint, the appropriate practice in objecting to the master's action was by exceptions to his report.[3]

§ 91. It is proper on denying a motion for a receiver to give leave to the moving party to renew his motion upon additional proof, if it appears that he may, by obtaining new proof, present a strong case for the relief sought.[4]

[1] Attorney-General *v.* Bank of Columbia, 1 Paige, 511.

[2] *In re* Eagle Iron Works, 8 Paige, 385.

[3] Creuze *v.* Bishop of London, Dick., 687.

[4] Devlin *v.* Hope, 16 Ab. Pr., 314.

And it is competent for plaintiff to ask and for the court to appoint a receiver after a hearing, and even after a rehearing and refusal, when an altered state of facts is presented showing an appropriate case for the relief.[1] But when the application has once been before the court and has been denied, a receiver will not be appointed upon a subsequent application upon a simple notice for that purpose, founded upon the same papers as before, without affidavits or additional proof showing a necessity for the relief. And this rule holds good, even though the court may have intimated, on the former application, that a receiver might afterwards be granted if circumstances should warrant it.[2]

§ 92. After a receiver has been appointed upon motion, pending an action against defendant, it is proper for the court to entertain an application to open and rehear the motion for the receiver, and to allow defendant to introduce proofs which could not be produced upon the former hearing. And if satisfied that the case is not a proper one for a receiver, the court may, upon such rehearing, deny the motion.[3] But, since a motion for a receiver in a creditor's suit is not regarded as involving the merits of the cause, being only incidental to the principal relief sought, where the courts are prohibited by statute from rehearing orders made in the progress of a cause which do not involve the merits, a motion for a receiver will not be reheard when once granted.[4]

§ 93. The practice is frequently adopted, when a receiver has been appointed over a particular subject-matter in behalf

[1] Attorney-General *v.* Mayor of Galway, 1 Mol., 95.

[2] Fenton *v.* Lumberman's Bank, Clarke Ch., 360. In Georgia, it is held that when an application for a receiver made in vacation is continued to the hearing, and a writ of error is sued out to reverse such order of continuance, it is competent for the court below in term time, and before any *remittitur* has been returned from the supreme court, to appoint a receiver upon the same bill and upon the same state of facts. McCaskill *v.* Warren, 58 Ga., 286.

[3] Belmont *v.* Erie R. Co., 52 Barb., 637.

[4] Sheldon *v.* Weeks, 2 Barb., 532.

of one creditor or a class of creditors, of extending the same receiver for the protection of other parties interested in the same subject-matter, for the purpose of saving the expense of a new appointment; or, if appointed over a part only of defendant's estate, he may be extended over the residue for the benefit of other creditors. In all such cases, the order extending the receiver is regarded as substantially an original or new appointment.[1]

§ 94. Under the Irish chancery practice, receivers are frequently appointed by consent of the parties to a cause, the consent in such cases being made a rule of court.[2] But such a consent will not be made a rule of court when it provides that the receiver shall not be obliged to account before the master, unless called upon so to do, since this would in effect make him merely the private agent of the parties, and not an officer of court.[3]

§ 95. Upon a special motion for a receiver, when notice has been given to defendant's solicitor, who does not appear or oppose the motion, the fact of a demurrer pending to the bill affords no objection to granting the order; since, if defendant intends to rely upon such demurrer as a bar to the appointment, he should appear upon the hearing of the motion and urge his objections.[4] And when an answer has been filed to the original bill, the court will entertain a motion for a receiver, notwithstanding the original bill has been amended after answer, and a plea has been filed to the amended bill and the plea is still undisposed of.[5]

§ 96. Under the English practice it is held that, when the application for a receiver is made for the first time in the cause, it must be heard in court; but if the application

[1] Corbet *v.* Mahon, 2 Jo. & Lat., 674; Agra & Masterman's Bank *v.* Barry, Ir. Rep., 3 Eq., 443. See, also, Imperial Mercantile Credit Association *v.* Newry & Armagh R. Co., Ir. Rep., 2 Eq., 1; LeGrand *v.* O'Neill, 2 Ir. Ch., N. S., 569; Abbott *v.* Stratten, 3 Jo. & Lat., 603.

[2] See Burke *v.* Burke, Flan. & K., 89.

[3] Richey *v.* Gleeson, Flan. & K., 99.

[4] Howard *v.* Palmer, Walk. (Mich.), 391.

[5] Thompson *v.* Selby, 12 Sim., 100.

is only to supply the place of a receiver already appointed, and whose office has become vacant by death or otherwise, it may be made in chambers.[1]

§ 97. Upon a mere formal motion to substitute one person in place of another as receiver in the action, the opposing party is not at liberty to examine the regularity of the original appointment, or the regularity of the proceedings had in the suit, since this would operate as a surprise upon the moving party, and he is entitled to notice of such objections.[2]

§ 98. It would seem that a receiver may be appointed in a case otherwise proper for the relief, if the facts showing the necessity for the relief and the proper parties are before the court, although the application was made for an injunction, and did not specify the appointment of a receiver.[3]

§ 99. Where a statute, authorizing the appointment of receivers to wind up the affairs of banking corporations, requires them to be sworn before entering upon their duties, the omission to be sworn does not have the effect of vitiating their proceedings, since they are officers of the court and their proceedings are subject to revision by the court.[4]

§ 100. As regards the form of an order appointing a receiver and authorizing him to sell the property in controversy, it would seem to be the better practice not to include in such order a direction as to applying the proceeds of the sale, since this is a matter for adjustment after a final decree settling the rights of all parties in interest.[5]

§ 101. When a receiver is appointed upon an interlocutory application, before final decree in the cause, the court does not thereby acquire such absolute control over the

[1] Grote *v.* Bing, 9 Hare, Appendix. 1.

[2] Fassett *v.* Tallmadge, 13 Ab. Pr., 12.

[3] Whitney *v.* Buckman, 26 Cal., 447.

[4] American Bank *v.* Cooper, 54 Me., 438.

[5] West *v.* Chasten, 12 Fla., 315.

cause as to deprive plaintiff in the action of the privilege of dismissing his bill if he sees fit.[1]

§ 102. There are frequent instances to be met with in the reports where the court, although of opinion that plaintiff was entitled to a receiver, has made the order in the alternative, requiring defendant to satisfy plaintiff's demand, or in default thereof that a receiver be appointed.[2]

[1] White *v.* Lord Westmeath, Beat., 174.

[2] See for such a case, Curling *v.* Townshend, 19 Ves., 628.

II. Time of Appointment.

§ 103. Receivers are usually appointed upon interlocutory application, in the earlier stages of the cause, although, as will hereafter be shown, the appointment may be made at the final hearing, and as a part of the final decree. Under the earlier English practice, the court would not entertain an application for a receiver until after defendant had appeared and answered. The rule, however, was gradually relaxed, and under the modern practice receivers were frequently granted before answer. And although the English Court of Chancery was always averse to interference before answer, unless for good cause shown, yet it may be regarded as the settled English practice to grant receivers before answer, in cases of emergency calling for the immediate interference of the court to protect the equities of plaintiffs, and where the merits of the case are sufficiently disclosed by affidavits.[1]

[1] Vann *v.* Barnett, 2 Bro. C. C., 158; Duckworth *v.* Trafford, 18 Ves., 283; Metcalfe *v.* Pulvertoft, 1 Ves. & Bea., 180; Woodyatt *v.* Gresley, 8 Sim., 180. In Duckworth *v.* Trafford, Lord Eldon observes that the old rule of not granting a receiver before answer, was first broken through by Lord Kenyon in Vann *v.* Barnett, and that the order then made for a receiver before answer had been followed since. He seems, however, to have fallen into an error as to the first departure from the ancient practice, since Lord Kenyon, in Vann *v.* Barnett, only says that a motion for a receiver before answer was unusual, and that he would, if necessary, have made a precedent. Vann *v.* Barnett was decided in 1787, and in a note to the case as reported in 2 Bro. C. C., 158, it is said by the reporter that a receiver before answer

And if defendant has put in an affidavit in opposition to plaintiff's affidavits upon the motion, the affidavit will be regarded as a sufficient appearance for the purpose of entertaining the motion.[1]

§ 104. As regards the grounds upon which the application has been entertained before answer, under the English practice, it has been held that where plaintiff shows a good equitable title to the property in controversy, as against which the title of defendant can not prevail, sufficient cause is presented.[2] So when habitual and manifest abuse is shown on the part of a defendant executor in the management of his trust, and when he is wasting and endangering the property entrusted to him, a receiver may be appointed before answer.[3]

§ 105. The modern English practice, allowing the appointment of a receiver before answer in cases of emergency, was adopted by the New York Court of Chancery, and has been generally followed in this country. And it may now be regarded as the uniform and well-established practice to entertain the application and to grant the relief before answer, where plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss, or where a clear case is shown of fraud and imminent danger unless the relief is granted.[4] In other words, if the emergency

was granted by Lord Bathurst in Compton *v.* Bearcroft, Trinity Term, 1773.

[1] Vann *v.* Barnett, 2 Bro. C. C., 158.

[2] Metcalfe *v.* Pulvertoft, 1 Ves. & Bea., 180.

[3] Middleton *v.* Dodswell, 13 Ves., 266.

[4] Bloodgood *v.* Clark, 4 Paige, 574; Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214; Jones *v.* Dougherty, 10 Ga., 273; Williams *v.* Jenkins, 11 Ga., 595; Johns *v.* Johns, 23 Ga., 31; Clark *v.* Ridgely, 1 Md. Ch., 70. See, also, Baker *v.* Adm'r of Backus, 32 Ill., 115, 116; Whitehead *v.* Wooten, 43 Miss., 523; Davis *v.* Browne, 2 Del. Ch., 188; Probasco *v.* Probasco, 30 N. J. Eq., 108. Bloodgood *v.* Clark, 4 Paige, 574, was an appeal from a decision of the Vice-Chancellor, refusing an application for a receiver of the property and effects of defendants in a creditor's bill. Walworth, Chancellor, says, p. 576: "The Vice-Chancellor was wrong

shown is such as to render it essential to justice that a receiver should be immediately appointed, it may be done before answer, since to delay the relief might entirely defeat the object sought by the application.[1] The practice is especially salutary in cases of creditors' bills in aid of the enforcement of judgments, and in this class of cases receivers are almost uniformly granted before answer.[2]

§ 106. While the practice of appointing receivers before answer, in cases of emergency, is thus shown to be well-established and generally followed by courts of equity in this country, yet the grounds which will induce the court to interfere at this stage of a cause must be very strong, and there must be clear proof of fraud, or of immediate danger to the property unless it is taken into the custody of the court.[3] And when there are no allegations of defendant's

in supposing that a receiver could not be appointed, in a case of this kind, until after the defendants had put in their answer. By the ancient practice of the Court of Chancery in England, a receiver was not appointed until after the coming in of the defendant's answer. This practice appears to have been first broken in upon in the case of Crompton *v.* Bearcroft, in 1773. And Lord Kenyon, the master of the rolls, appointed a receiver before answer in the case of Vann *v.* Barnett, in 1787, 2 Brown's C. C., 158. He said, that although a motion for a receiver before answer was then unusual, yet had it been necessary he would have made a precedent. And it now appears to be well settled, both here and in England, that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss."

[1] Johns *v.* Johns, 23 Ga., 31.

[2] See Bloodgood *v.* Clark, 4 Paige, 574; Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214.

[3] Clark *v.* Ridgely, 1 Md. Ch., 70; Brick Company *v.* Robinson, 55 Md., 410; Latham *v.* Chafee, 7 Fed. Rep., 525; West *v.* Swan, 3 Edw. Ch., 420; Baker *v.* Adm'r of Backus, 32 Ill., 115, 116; Beecher *v.* Bininger, 7 Blatchf., 170; Whitehead *v.* Wooten, 43 Miss., 523. "The appointment of a receiver," says Simrall, J., in the case last cited, "is a peremptory remedial measure. Its effect is to deprive the defendant in possession, temporarily at least, of his property, before final decree settling the rights of parties litigant. If the application is made before the merits of the cause are disclosed, as before a *pro confesso* or answer filed, there must be strong grounds laid. . . There

insolvency, or of danger to the property and interests concerned, the relief will not be granted before answer.[1] So when insolvency is the ground relied upon, but the affidavit on which the application is based merely states that defendant is not deemed a responsible man by those who know him, and the affidavit of defendant fully negatives the insolvency, a receiver will be refused.[2] And in an action brought by a shareholder of a corporation to cancel certain illegal stock, and to restrain the holders of such shares from assigning or encumbering them, the appointment of a receiver of the shares is improper upon an *ex parte* application before answer, when it is not shown that defendants are irresponsible, or that there is any danger of loss from a transfer of the shares.[3]

§ 107. Interlocutory applications for a receiver before answer are usually supported by affidavits of the grounds relied upon, and it would ordinarily seem to be sufficient if the facts upon which the application is based are verified by the affidavit of plaintiff alone.[4] And when plaintiff moves for an injunction and a receiver upon bill filed, before the coming in of the answer, upon grounds of emergency, defendant may be heard by affidavit in opposition to the motion.[5] If the appointment is made before answer, it is proper for the defendant, after filing his answer, to move to discharge the receiver; and if, upon such motion, the bill and answer, taken together, show that a receiver ought not to have been appointed, he will be discharged.[6]

§ 108. It would seem that, as regards the rights of third persons, the appointment of a receiver will not be allowed to take effect or date back by relation to a period prior to

must be strong and special reasons for the appointment before answer, as on proof of fraud, by affidavits or immediate danger to the property, unless at once taken in charge by the court."

[1] Simmons *v.* Wood, 45 How. Pr., 269.

[2] West *v.* Swan, 3 Edw. Ch., 420.

[3] People *v.* Albany & Susquehanna R. Co., 7 Ab. Pr., N. S., 290.

[4] Jones *v.* Dougherty, 10 Ga., 273.

[5] Kean *v.* Colt, 1 Halst. Ch., 365.

[6] Phœnix Mutual Life Insurance Co. *v.* Grant, 3 MacArthur, 220.

his appointment. It is therefore improper to insert such a clause in the order of appointment, and its insertion will not be allowed to affect the rights of parties in interest and not notified.[1]

§ 109. Although it is the usual practice to apply for a receiver upon interlocutory motion, yet in a proper case the appointment may be made at the final hearing, and as a part of the final decree.[2] Thus, in case of a judgment or decree dissolving a partnership, when a receiver is necessary to wind up the firm business, the appointment may be made as a part of the decree and for the purpose of carrying it into effect.[3] So where the right to a receiver depends upon questions of law of much nicety, as well as questions of title which are involved in considerable doubt, the court may properly refuse the application *in limine*, and leave it to be determined upon a final hearing of the cause.[4] And the appointment may be made at the final hearing, even though the bill contains no prayer for a receiver.[5]

§ 110. While it rarely happens that courts are called upon to appoint a receiver after a final decree in the cause, the power of appointment after decree is well settled and is exercised in cases of great emergency, or where the relief is indispensable for the protection of the parties in interest.[6] Thus, in an action brought by persons beneficially interested under a will, against the trustees and executors, to have the trusts of the will performed under direction of the court, if after decree the conduct of the trustees is such as to render

[1] Artisans' Bank *v.* Treadwell, 34 Barb., 553.

[2] Shulte *v.* Hoffman, 18 Tex., 678; Shee *v.* Harris, 1 Jo. & Lat., 91. See, also, Bowman *v.* Bell, 14 Sim., 392.

[3] Shulte *v.* Hoffman, 18 Tex., 678.

[4] Hawkins *v.* Luscombe, 2 Swans., 375.

[5] See observations of the Vice-Chancellor in Osborne *v.* Harvey, 1 Y. & C. C. C., 116; Bowman *v.* Bell, 14 Sim., 392.

[6] Wright *v.* Vernon, 3 Drew., 112; Bowman *v.* Bell, 14 Sim., 392; Thomas *v.* Davies, 11 Beav., 29; Connelly *v.* Dickson, 76 Ind., 440; Brinkman *v.* Ritzinger, 82 Ind., 358; Schreiber *v.* Carey, 48 Wis., 208; Haas *v.* Chicago Building Society, 89 Ill., 498. See, also, Hiles *v.* Moore, 15 Beav., 175.

a receiver necessary, the court will entertain the application, even though the bill contains no prayer for a receiver.[1] So in an action to determine the conflicting rights of parties to real estate, when a final decree has been rendered establishing plaintiff's title and right to a portion of the property, but the decree contains no specific directions to defendants to surrender possession of such portion, and they refuse so to do, plaintiff may have a receiver for the purpose of collecting and preserving the rents, and to insure their proper application to the expenses of the estate. In such case, the receiver is not appointed for the purpose of executing the decree, or to turn defendants out of possession, but only to protect the rights of plaintiffs in the property. And the fact that the bill did not pray a receiver is no bar to the relief in such case, since the appointment is made because of circumstances subsequent to the decree.[2] So after a decree for the foreclosure of a mortgage, a receiver of the rents of the mortgaged premises was allowed, as against a tenant in possession for more than nineteen years, but who was not a party to the suit, the exigency of the case requiring the relief to prevent the tenant from setting up an adverse possession of twenty years.[3] And after a final decree confirming a sale of land to a purchaser at a judicial sale and awarding a writ of assistance, the purchaser being entitled to the rents may have a receiver pending an appeal by defendant, it appearing that defendant is insolvent, and that if he is permitted to retain possession, the rents will be lost to the purchaser.[4] So when real estate of a debtor has been decreed to be sold in satisfaction of liens and demands of his creditors, a receiver has been appointed by the court below upon the application of the creditors, to receive the rents and profits pending an appeal and *supersedeas* to such decree, the defendant being insolvent, and the lands being

[1] Bowman *v.* Bell, 14 Sim., 392.

[2] Wright *v.* Vernon, 3 Drew., 112.

[3] Thomas *v.* Davies, 11 Beav., 29.

[4] Merrill *v.* Elam, 2 Tenn. Ch., 513. As to the effect of the appeal upon such order appointing a receiver, see Payne *v.* Baxter, 2 Tenn. Ch., 517.

insufficient to satisfy the liens thereon.[1] But a strong case of probable injury must be made out, to warrant the court in entertaining the application at this stage of the cause.[2] And upon a bill by a mortgagor against a mortgagee for redemption of the mortgaged premises, after a decree directing the redemption, the court will not, upon the *ex parte* application of defendant, entertain a motion for a receiver, such a practice being without precedent or authority.[3]

[1] Beard *v.* Arbuckle, 19 W. Va., 145.

[2] Adair *v.* Wright, 16 Iowa, 385.

[3] Barlow *v.* Gains, 8 Beav., 329.

III. Notice of the Application.

§ 111. Courts of equity are exceedingly averse to the exercise of their extraordinary jurisdiction by the appointment of receivers upon *ex parte* applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the immediate interference of the court for the prevention of irreparable injury, or in cases where defendant has absconded and willfully put himself beyond the jurisdiction of the court. And it may be stated as the settled practice, both in England and America, to require the moving party to give due notice of the application to defendant, over whose effects he seeks the appointment of a receiver, in order that he may have an opportunity of being heard in defense, and that his property may not be summarily wrested from him upon an *ex parte* application. Even in exceptional cases of great emergency, when the relief is demanded for the prevention of irremediable injury, the courts are extremely averse to interference *ex parte*, and will ordinarily entertain the application only after notice to defendant, or a rule to show cause.[1]

[1] Verplanck *v.* Mercantile Insurance Co., 2 Paige, 438; Sandford *v.* Sinclair, 8 Paige, 373; People *v.* Albany & Susquehanna R. Co., 7 Ab. Pr., N. S., 265; S. C., 1 Lans., 308; S. C., 55 Barb., 34; S. C., 38 How. Pr., 228; Field *v.* Ripley, 20 How. Pr., 26; Bisson *v.* Curry, 35 Iowa, 72, following French *v.* Gifford, 30 Iowa, 148; Blondheim *v.* Moore, 11 Md., 365; Triebert *v.* Burgess, 11 Md., 452; Whitehead *v.* Wooten, 43 Miss., 523; Rogers *v.* Dougherty, 20 Ga., 271; Nusbaum

§ 112. The rule of practice thus stated, requiring notice to defendant before an application for a receiver will be entertained, would seem to be not a matter of discretion with the court, but an inflexible rule which the courts are not at liberty to disregard. And it is held to be error for the court to entertain the application, and to appoint a receiver without notice to the adverse party.[1] And the fact that a receiver is appointed upon the same day with the filing of the bill, without notice to defendant of the application, is deemed sufficient ground for reversing the action of the court.[2] So when the appointment was made without notice to defendants, who were merchants residing and doing business in the same city, and within a short distance from the court, no imperative necessity being shown for such haste, the order of the court was revoked.[3] And when plaintiff had procured the appointment of a receiver upon an *ex parte* application, late at night, and the receiver sold the property early the following morning, the court set aside the sale, and revoked the appointment as contrary to equity, and in conflict with the due and ordinary course of procedure in courts of justice.[4] And the judgment of a court below, revoking the appointment of a receiver, because of want of notice, will be affirmed by a court of error.[5] But it is held in Maryland, that no advantage can be taken in an appellate court of the want of notice, except by an appeal from the order appointing the receiver.[6] Under the New York chancery practice, however, if the court below had improperly allowed an *ex parte* application for a receiver

v. Stein, 12 Md., 315; Caillard *v.* Caillard, 25 Beav., 512; Voshell *v.* Hynson, 26 Md., 83; Crowder *v.* Moone, 52 Ala., 220; Howe *v.* Jones, 57 Iowa, 130. Under the statutes of Iowa, a receiver may be appointed in a law action, before notice to defendant. Jones *v.* Graves, 20 Iowa, 596.

[1] Bisson *v.* Curry, 35 Iowa, 72, following French *v.* Gifford, 30 Iowa, 148. See, also, Railway Co. *v.* Jewett, 37 Ohio St., 649.

[2] Nusbaum *v.* Stein, 12 Md., 315.

[3] Triebert *v.* Burgess, 11 Md., 452.

[4] Simmons *v.* Wood, 45 How. Pr., 268.

[5] Rogers *v.* Dougherty, 20 Ga., 271.

[6] Voshell *v.* Hynson, 26 Md., 83.

and the appointment was clearly irregular, defendant could not appeal directly from that order, but was required first to apply to the court below to set aside or modify the order, and if upon a proper application the court refused so to do, an appeal would then lie from the order denying the application.[1] But upon an appeal from an order appointing a receiver, if the record is silent as to whether due notice of the application was given to defendant, it will be presumed that the court below did not act without proof of notice.[2]

§ 113. To warrant a court in entertaining an application for a receiver without notice, it must be clearly shown that the delay which would result from giving notice would defeat the rights of plaintiff, or would result in great injury to him.[3] And when the relief is sought upon an *ex parte* application, upon the ground of extreme necessity, the particular facts and circumstances rendering such summary proceeding necessary should be set forth in the application, and a mere statement of opinion as to such necessity, even though made under oath, will not justify a departure from the established rule requiring notice of the application.[4]

§ 114. As to whether defendant must be actually served

[1] Gibson *v.* Martin, 8 Paige, 481.

[2] Miller *v.* Shriner, 86 Ind., 493.

[3] Maynard *v.* Railey, 2 Nev., 313.

[4] Verplanck *v.* Mercantile Insurance Co., 2 Paige, 438. Walworth, Chancellor, says, p. 450: "By the settled practice of the court in ordinary suits, a receiver can not be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or can not be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party, to prevent the destruction or loss of property. Formerly it was never done until after answer. In every case where the court is asked to deprive the defendant of possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded. Ogilvie's affidavit in this case, that he was satisfied of the necessity of such a proceeding, was not sufficient. He should have stated the facts on which his opinion was founded, to enable the court to judge of its correctness."

with process in the cause, in addition to notice of the motion for a receiver, before the court will entertain the application, is not quite clear from the authorities. It would seem, upon principle, that under the prevailing practice of hearing the application before answer, no real necessity exists of formal service of process in the cause as a foundation for the motion, if defendant has due notice of the application. And under the English chancery practice, plaintiff was at liberty, immediately upon filing his bill, to serve defendant with notice of the motion before appearance.[1] But it has been held, that a receiver should not be appointed unless the court has obtained jurisdiction by service of process, as well as notice to the parties in interest of the application.[2] If, however, a receiver is prayed for as a part of the final relief sought in the action, the process which brings defendant into court to answer, is sufficient notice of the final relief prayed. Upon appeal, therefore, from the appointment of a receiver in such case as part of the final decree, it will not be reversed because of the want of other notice of the application.[3]

§ 115. Even under a statute authorizing the appointment of receivers over insolvent corporations, the appointment will not be made *ex parte* and without an opportunity to the defendant of being heard. And the practice of the New York Court of Chancery in such cases was, upon the filing of a petition duly verified, setting forth the grounds on which the application was based, to issue an order to show cause, a copy of which was served upon the proper officers of the corporation, directing them, at a future day therein named, to show cause why the application should not be granted.[4]

[1] Meaden *v.* Sealey, 6 Hare, 620.

[2] Whitehead *v.* Wooten, 43 Miss., 523. "It can not well be seen," say the court, Simrall, J., p. 527, "how the court can take from a defendant the possession of property, unless it has jurisdiction by service of process and also by notice of motion." And see Hyslop *v.* Hoppock, 5 Benedict, 447.

[3] Newell *v.* Schnull, 73 Ind., 241.

[4] Devoe *v.* Ithaca & Owego R. Co., 5 Paige, 521.

§ 116. It is not in all cases indispensable that the notice should be personally served upon each defendant, provided service be had upon one of the defendants authorized to represent the others. Thus, it is held sufficient to serve the notice upon a defendant who is the authorized agent of his co-defendant, and who is acting under a power of attorney from him in the management of the very property over which a receiver is sought.[1] And the application may be entertained and determined without any previous formal notice to the parties in interest, when they are actually represented in court by counsel who appear in resistance to the motion.[2]

§ 117. While it is the uniform practice, as already shown, to entertain applications for receivers only after due notice to the parties against whom the receiver is sought, a departure from this practice is allowed when a defendant has absconded for the purpose of avoiding service of process. And in such cases the application may be entertained without notice, service of process, or appearance by defendant;[3] especially when plaintiff has given notice of the application to the agents and tenants of defendant's estate over which a receiver is sought.[4] So notice may be dispensed with when defendant has left the state and is not expected to return for several months, and no person is authorized to represent him, and it is necessary to appoint a receiver without delay to collect rents which would otherwise be lost. In such case, the order of appointment should reserve to defendant the right to apply for relief against the order upon cause shown.[5] And where real estate had been conveyed by a debtor in trust for the payment of his debts, and the trustee had been in possession a number of years

[1] Mays *v.* Rose, Freem. (Miss.), 703. And see Maguire *v.* Allen, 1 Ball & B., 75.

[2] McLean *v.* Lafayette Bank, 3 McLean, 503.

[3] Maguire *v.* Allen, 1 Ball & B., 75; Dowling *v.* Hudson, 14 Beav., 423. See Gibbins *v.* Mainwaring, 9 Sim., 77; Williams *v.* Jenkins, 11 Ga., 595.

[4] Maguire *v.* Allen, 1 Ball & B., 75.

[5] People *v.* Norton, 1 Paige, 17.

without paying, a creditor was allowed a receiver until answer, the trustee residing beyond the jurisdiction of the court and not having appeared in the action.[1] And under a statute authorizing the appointment upon such notice to the adverse party as the court may prescribe, when such adverse party is beyond the jurisdiction of the court in another state, it is not error to make the order without notice, when necessary for the prevention of serious loss.[2] So under the code of procedure of New York, it is held that a receiver may be appointed over a partnership in an action for a dissolution, upon the appearance of the resident partners without notice to a non-resident partner.[3] But when it does not appear that defendant has left the country to avoid service of process, and no particular circumstances of hardship are shown, an *ex parte* application for a receiver will not be entertained.[4]

[1] Malcolm *v.* Montgomery, 2 Mol., 500.

[2] Maish *v.* Bird, 59 Ia., 307.

[3] Alford *v.* Berkele, 29 Hun, 633.

[4] Stratton *v.* Davidson, 1 Russ. & M., 484.

CHAPTER V.

OF THE RECEIVER'S BOND AND LIABILITY THEREON.

I. Of the Bond.

§ 118. Receivers are usually required, before entering upon their duties, to enter into a bond or recognizance for the faithful performance of their duties, with adequate security, the amount and conditions of the security being usually determined by the court making the appointment, due regard being had to the value of the property or fund entrusted to the receiver's management. Under the practice of the English Court of Chancery, established at an early period, a receiver was required to enter into a recognizance with two sureties,[1] and it was customary to require him to give security in all cases when the order was made in the usual way by the court, and a reference had to a master to appoint; and it was held that the security could

[1] Mead *v.* Orrery, 3 Atk., 235.

not be dispensed with in such cases, even by consent of the parties to the action.[1] If, however, the parties themselves agreed upon a receiver to be appointed, not by authority of court, but by their own consent, and then asked that he should act without giving the usual security, it was regarded as proper to permit this to be done.[2] And when a receiver was appointed without salary, it was said to be not unusual to dispense with the security otherwise required.[3] And a mortgagee of West Indian estates was in one case appointed receiver in England, without being required to give the usual security.[4]

§ 119. It was held in an early English case, that persons named as receivers by parties to the cause, might be appointed upon their own recognizances only.[5] And when a receiver was satisfactory to all parties except the defendant, and had been in the previous possession and management of the estate in controversy, it was provided by the terms of the decree that he should be allowed to give security by his individual recognizance.[6] But in the Irish Court of Chancery, it is held that a receiver will not be appointed without giving adequate security, even though the parties in interest consent that he may be appointed merely upon his own recognizance.[7]

§ 120. In New York, the obligation of a receiver to give adequate security for the faithful performance of his trust, is regarded as being founded upon the general practice of courts of equity, and it is held to be within the power of the court to dispense with security in cases where it is plainly unnecessary. For example, where, in proceedings by judgment creditors against their debtor, the same person is appointed receiver in different actions brought by

[1] Manners *v.* Furze, 11 Beav., 30. See, also, Tylee *v.* Tylee, 17 Beav., 583.

[2] Manners *v.* Furze, 11 Beav., 30.

[3] Gardner *v.* Blane, 1 Hare, 381.

[4] Davis *v.* Barrett, 13 L. J., N. S. Ch., 304.

[5] Ridout *v.* Earl of Plymouth, Dick., 68.

[6] Carlisle *v.* Berkley, Amb., 599.

[7] Bailie *v.* Bailie, 1 Ir. Eq., 413.

different creditors, it is held that he need not give new security in each successive action, if he has already given ample security.[1]

§ 121. The receiver's title and authority as well as his right of possession are dependent on and accrue only upon his giving the requisite bond or security as fixed by the order of his appointment.[2] And a failure to execute the bond in due form, as required by the order, is ground for a nonsuit in an action brought by the receiver in his official capacity,[3] although a mere informality in the bond, as the fact that it was not executed under seal, can not be taken advantage of in an action brought by the receiver against third parties.[4] So when creditors of the defendant levy upon the property which is the subject-matter of the receivership, between the date of the appointment and the time of giving the required security, such levy constitutes no disturbance of the receiver's possession.[5] If, however, between the date of the appointment and the time of giving the required bond or recognizance, a solicitor in the cause receives money due as rents or proceeds of the sale of property which is the subject-matter of the receivership, he may be compelled, after the bond or recognizance is perfected, to pay such money to the receiver.[6] And when a receiver executes his bond in due form, with sufficient sureties, and the bond is approved by the parties, but through inadvertence is not filed with the court, and the receiver takes possession of the assets committed to his charge, it is proper for the court to direct the bond to be filed *nunc pro tunc*, so as to complete the re-

[1] Banks *v.* Potter, 21 How. Pr., 469.

[2] Johnson *v.* Martin, 1 Thomp. & C. (N. Y. Supreme Court), 504; Defries *v.* Creed, 34 L. J., N. S. Eq., 607; Edwards *v.* Edwards, 2 Ch. D., 291, reversing S. C., 1 Ch. D., 454. But see *Ex parte* Evans, 13 Ch. D., 252.

[3] Johnson *v.* Martin, 1 Thomp. & C. (N. Y. Supreme Court), 504. And see as to receiver's failure to give security as ground for reversing decree, Tomlinson *v.* Ward, 2 Conn., 396.

[4] Morgan *v.* Potter, 17 Hun, 403.

[5] Defries *v.* Creed, 34 L. J., N. S. Eq., 607; Edwards *v.* Edwards, 2 Ch. D., 291, reversing S. C., 1 Ch. D., 454. But see *Ex parte* Evans, 13 Ch. D., 252.

[6] Wickens *v.* Townshend, 1 Russ. & M., 361; *In re* Birt, 22 Ch. D., 604.

ceiver's appointment and render him liable to account as an officer of the court, for the property which came to his hands subsequent to the time when the bond should have been filed. And this may be done, notwithstanding the parties to the litigation have, after the receiver's appointment, submitted the matter in dispute to referees for settlement, and have consented to a decree dividing the property equally between them; since such submission to arbitration does not alter or affect the liability of the receiver to account for the property entrusted to him.[1] So where on his appointment, a receiver had entered into a recognizance with two sureties, and one of them afterwards caused himself to be discharged, and the receiver entered into a new recognizance, but the time for enrolling it had elapsed, it was ordered to be entered *nunc pro tunc*.[2]

§ 122. When a receiver is appointed as a part of the final judgment or decree in the cause, and for the purpose of carrying out and executing that decree, the fact that the court has failed to require any bond of the receiver constitutes no ground for reversing the decree on error, since the omission will be regarded as the fault of the defendant in not insisting upon a bond.[3]

§ 123. Under the Irish chancery practice, it is customary, when a receiver has been appointed over real property, and subsequent applications are made for a receiver over the same estate, to extend the appointment of the former receiver to such applications. And on being so extended, he is required to give additional security, or, in default thereof, he will be removed and another appointment made.[4]

§ 124. Where, upon a bill in equity to enforce an interest in a trust fund and for a receiver *pendente lite*, the court refuses to appoint a receiver, upon condition of defendant executing a bond to account as receiver for all goods and money which had come into his possession, and to pay them over pursuant to the decree of the court, such a bond will

[1] Whiteside *v.* Prendergast, 2 Barb. Ch., 471.

[2] Vaughan *v.* Vaughan, Dick., 90.

[3] Shulte *v.* Hoffman, 18 Tex., 678.

[4] Wise *v.* Ashe, 1 Ir. Eq., 210.

be deemed good as a common-law obligation. And the obligor, although not considered as a receiver or officer of the court, stands in the light of one who, for a personal accommodation, has assumed a legal responsibility, and after receiving the benefits of the obligation he is estopped from denying its legality.[1]

§ 125. Where one of three executors of an estate was appointed receiver in another matter, and he, with the other executors, united in assigning a mortgage of their testator, held by them as executors, as security for such receivership, although such course was regarded as exceedingly reprehensible, it was held that the assignment was good and could not be questioned, and that it must stand as security for whatever amount might be due from the receiver.[2]

§ 126. It is customary in the order of appointment to provide that the sureties upon the bond shall be approved by the court, although it is sometimes provided that they may be approved by the clerk. But when the law under which a receiver is appointed, authorizes his appointment and the approval of his bond by the court, both acts being required to be performed by the court itself, it is not proper that the bond should be approved by the clerk of the court.[3] But it is not necessary that the sureties should be citizens of the state in which the action is pending, and the court may accept non-resident sureties.[4]

§ 126 *a*. It is held in England, that money due from a receiver, and not accounted for in the settlement of his accounts, is to be treated as a debt of record, as regards the application of the statute of limitations in an action for the recovery of such money. And it would seem that, as to money due from the receiver and not accounted for, he occupies the relation of a trustee to the parties in interest, and that such indebtedness is not barred by the statute of limitations.[5]

[1] Baker *v.* Bartol, 7 Cal., 551.

[2] Mead *v.* Orrery, 3 Atk., 235.

[3] Newman *v.* Hammond, 46 Ind., 119.

[4] Taylor *v.* Life Association of America, 3 Fed. Rep., 465.

[5] Seagram *v.* Tuck, 18 Ch. D., 296.

II. Liability of Sureties.

§ 127. Sureties held to strict liability; how discharged.
128. On death of one surety receiver must procure another.
129. When liability becomes absolute; right of action; practice.
130. Suit against sureties on death of receiver.
130 *a*. How far sureties concluded by order on receiver.
131. Liability for interest; costs of attachment; surety protected by injunction.
132. Effect of payment by surety to solicitor.
133. Surety may be reimbursed out of balance in receiver's hands; ordered to refund; remedy in equity.
133 *a*. Sureties of clerk of court appointed receiver; liability to creditors not named in bond.

§ 127. The sureties of a receiver are usually held very strictly to the obligation of their recognizance or bond, and will not be discharged therefrom upon their own application, unless such course appears to be for the benefit of the parties to the cause,[1] or unless fraud is shown, and it is made to appear that the person secured by the recognizance is connected with such fraud; and if these facts are not shown, a bill to have a recognizance vacated will be dismissed.[2] But it is competent for the parties in interest in a cause to consent that the receiver's recognizance or bond be vacated as to one surety, and that he be discharged, without releasing the remaining surety from his liability. When it is desired to pursue this course, the continuing surety and the receiver should enter into a written consent or agreement, providing that the recognizance shall continue to be binding upon them, notwithstanding it has been vacated as to the retiring surety. This agreement should be verified by affidavit, and should state that the parties consent to the vacating of the recognizance as to the one surety, without prejudice to the liability of the receiver and of the other surety, as well for acts before as for those after-

[1] Griffith *v.* Griffith, 2 Ves., 400.

[2] Hamilton *v.* Brewster, 2 Mol., 407.

ward done, and that they will not rely on such discharge in defense of any future proceedings which may be brought against them.[1] Where the premises subject to a receivership have been sold under the final decree in the cause, and the purchaser has been put in possession, this has been held equivalent to a discharge of the receiver, and sufficient ground for vacating his recognizance.[2]

§ 128. Where one of the sureties upon the recognizance of a receiver dies, without leaving any property which can be made available for the purpose of satisfying the recognizance, the court will require the receiver to procure a new surety.[3]

§ 129. When the bond or recognizance given by a receiver is conditioned to be void if he shall duly perform his duties as receiver and account to the court, the obligation becomes absolute upon his failure so to do.[4] It is held, however, that the receiver and his sureties are not liable to an action upon the bond until he has failed to obey some order of the court touching the effects placed in his hands. And the proper practice would seem to be, to first apply to the court for a rule upon the receiver to render his account. After the account is adjusted and approved by the court, and the receiver is ordered to pay the effects in his hands into court, or to the person entitled thereto, a failure to comply with such order renders himself and his sureties liable. The receiver and his sureties can not therefore be sued upon the bond until the court has adjudicated the question, and made some order touching the rights of the parties to the property in his hands.[5]

§ 130. Where, upon the death of a receiver, there is a balance due from him to the estate, the amount of which is

[1] Callaghan *v.* Callaghan, 8 Ir. Eq., 572; O'Keeffe *v.* Armstrong, 2 Ir. Ch., N. S., 115.

[2] Anonymous, 2 Ir. Eq., 416.

[3] Averall *v.* Wade, Flan. & K., 341.

[4] Maunsell *v.* Egan, 3 Jo. & Lat., 251.

[5] State *v.* Gibson, 21 Ark., 140; Bank of Washington *v.* Creditors, 86 N. C., 323; Atkinson *v.* Smith, 89 N. C., 72.

not definitely ascertained, the court, on petition of parties in interest, will grant leave to put the recognizance in suit against the sureties. The receiver in such case not having paid the balance into court, there is a forfeiture of the recognizance, constituting a debt due from the receiver, and there being no means of pursuing the ordinary remedy against him, resort may be had to the surety.[1]

[1] Ludgater *v.* Channell, 3 Mac. & G., 175, reversing S. C., 15 Sim., 479. The petition in this case alleged that the receiver had died, leaving a balance due from him to the estate, and prayed that the recognizance which he had entered into might be put in suit against his real and personal representatives and his sureties, or that his personal representative might forthwith pass the accounts of his receipts and payments in respect to the estate. On appeal from the decision of the Vice-Chancellor, dismissing the petition, leave was granted to bring suit against the sureties. Lord Truro observes, p. 179, as follows: "It is of the utmost importance that the functions of receivers, who are the officers of this court, should be duly discharged. The respondents in the present case are the sureties, and the representatives of the receiver; and the recognizance in question was entered into in pursuance of a general order of the court. Now the obligation of a receiver is to account once a year, and to pay his balances into court; but here this duty was entirely omitted, thus involving a forfeiture of the recognizance, and consequently constituting a debt due by the receiver. Upon the death of the receiver, the parties interested in the fund come to the court and state that redress may be had in one of two ways, either against the representatives of the receiver, or against his sureties. They present their claim in a double aspect, and call on the court to grant them relief as against one or other of the respondents to the petition; and it is obvious that if either of the respondents had been omitted, the other would have objected, and with some reason, to his absence. But the administratrix says she is not accountable in this form of proceeding; and the sureties, on their part, allege that there is a positive rule of practice that the surety can not be made to account until the receiver has been called upon, and further, that the mode of proceeding in such a case is by bill against the personal representative. I can, however, find no authority for the rule which it is thus sought to establish. . . The books of practice show that where there are not the means of pursuing the ordinary course against the receiver, the surety may be had recourse to; and the first part of the prayer of the petition is for leave to sue the sureties. Not therefore now deciding whether the surety shall pay, or whether the administratrix may or may not be called on to account in this form of proceeding, I think that the first part of the

§ 130 *a*. In an action against the sureties upon the bond of a receiver of an insolvent corporation, an order made in the cause in which the receiver was appointed, fixing the amount due from him and directing its payment, is competent evidence against the sureties, both as to the breach of the bond and as to the amount due. And in such an action, the omission of the receiver to pay to himself as receiver money which he had borrowed from the corporation before his appointment is a breach of the condition of his bond, for which the sureties are liable. Nor in such case can the liability of the sureties be reduced by the fact that the receiver has rendered valuable services as such, his compensation for which has not yet been determined or paid.[1] But when the undertaking of the surety is that the receiver will thenceforth faithfully discharge his duties, the surety will not be liable for any default or misconduct of the receiver prior to the execution of the bond. And in such case the surety, in an action upon his bond, is not concluded by an accounting as to the amount due from the receiver, and by an order fixing the amount, made in the cause in which the receiver was appointed, when the surety was not a party to such accounting, and was not heard thereon.[2] But if the receiver does in fact receive and collect certain notes, which he is not authorized to receive in payment for the hiring of property which he is authorized to hire, his sureties are liable in an action upon the bond for his failure to account for the proceeds.[3]

§ 131. As a general rule, the sureties of receivers will be held responsible, not only for all sums of principal for which the receiver is in default, but also for interest due

prayer of the petition must be granted, and it is unnecessary for me to advert further to the alternative relief sought."

[1] Commonwealth *v.* Gould, 118 Mass., 300.

[2] Thomson *v.* MacGregor, 81 N. Y., 592.

[3] Weems *v.* Lathrop, 42 Tex., 207. And see this case as to the right of a receiver, appointed upon the death of a former receiver, to maintain an action against the sureties upon the bond of such former receiver.

thereon, and for which the receiver is liable.[1] This liability of the surety for interest is, however, regarded as somewhat discretionary with the court.[2] And where the receiver had been bankrupt with full knowledge of all parties for a considerable length of time, and no steps had been taken to compel the passing of his accounts, the sureties were relieved from paying interest.[3] But the sureties of a defaulting receiver will be held liable to the extent of the sum secured by the recognizance, for the costs of an attachment against him for not accounting, as well as the costs of an application for his removal, and for the appointment of his successor.[4] When the surety has paid in full the entire balance due from the receiver, he may be protected by injunction from the enforcement of judgment upon his recognizance for anything more.[5]

§ 132. Where proceedings at law were instituted against the surety to enforce payment of money due from the receiver, who had been discharged under the insolvent debtor's act, it was held that payment of the money by the surety to the solicitor prosecuting the proceedings was not a sufficient payment, and the court refused to discharge the proceedings against the surety until plaintiff had been served with notice of the application. But notice having been served, and the plaintiff not appearing or resisting, the proceedings against the surety were discharged.[6]

§ 133. A surety upon a receiver's bond is in a certain sense regarded as an officer of the court, to the extent that he is entitled to be reimbursed what he has been compelled to pay for the receiver, out of the balance in the latter's hands. The court will not, therefore, permit the receiver to withdraw a balance due him until the surety is reim-

[1] Dawson *v.* Raynes, 2 Russ., 466.

[2] *In re* Herrick's Minors, 3 Ir. Ch., N. S., 183.

[3] Dawson *v.* Raynes, 2 Russ., 466.

[4] Maunsell *v.* Egan, 8 Ir. Eq., 372, affirmed on appeal, 9 Ir. Eq., 283; S. C., 3 Jo. & Lat., 251.

[5] *In re* Herrick's Minors, 3 Ir. Ch., N. S., 183.

[6] Mann *v.* Stennett, 8 Beav., 189.

bursed, and only the balance will be paid to the receiver.[1] And when the surety, to indemnify himself for his liability, receives a portion of the funds collected by the receiver, knowing them to be a part of the trust funds in the hands of the latter, the court has sufficient jurisdiction over the surety by reason of his suretyship and of his intermeddling with the funds, to act by an order *in personam* in the cause in which the receiver was appointed, directing the surety to pay such money into court.[2] And in Mississippi, it is held to be an appropriate exercise of legislative authority to confer upon a court of equity jurisdiction over the bond of a receiver and over the sureties, such jurisdiction being regarded as ancillary to its jurisdiction over the subject-matter in controversy. A statute, therefore, authorizing a court of equity to give a remedy by *scire facias* against the sureties is held to be valid and constitutional.[3]

§ 133 *a*. When the court has appointed its own clerk as receiver in a cause, in the absence of any statute in force at the date of the bond fixing the liability of his sureties in

[1] Glossup *v.* Harrison, 3 Ves. & Bea., 134. This was a motion by the surety of a receiver who had been discharged by order of the court, to restrain him from taking out of court the balance due him until he should satisfy payments made by the surety on his account. Lord Eldon observed, p. 135: "Where the surety for a receiver in this court is called upon to pay, as the receiver is an officer of the court, and the surety is so in a sense, if there is anything due in account between them, justice requires that upon the application of the surety he shall be indemnified for what he has paid for the receiver out of the balance due him. If that has not been decided, as I think it has, it must be decided upon principle, as it is clearly capable of being maintained upon equitable grounds. The court, therefore, can not part with the fund, until an opportunity is given of determining the claim of the surety; the amount of which, when ascertained, must be paid to him; and the residue only must be paid to the receiver."

[2] Seidenbach *v.* Denklespeil, 11 Lea, 297.

[3] Bank *v.* Duncan, 52 Miss., 740. As to the right of a surety upon a receiver's bond to appeal from an order for the payment of the amount of the bond, made in the cause in which the receiver was appointed, see *In re* Guardian Savings Institution, 78 N. Y., 408.

such case, the sureties upon the official bond of the clerk are not liable for his default as receiver, since they are presumed to have contracted with reference only to his liability as clerk.[1] But, although the bond is conditioned for the payment of certain creditors named, and the creditors have been fully paid, yet if it is further conditioned that the receiver will well and truly account for all moneys received by him, and will pay over all such moneys and comply with all orders of the court concerning the same, a breach of such condition will warrant a recovery against the sureties in behalf of creditors who are not expressly named in the bond.[2]

[1] Kerr *v.* Brandon, 84 N. C., 128; Rogers *v.* Odom, 86 N. C., 432; Syme *v.* Bunting, 91 N. C., 48. But see Syme *v.* Bunting as to the effect of a statute enlarging the clerk's liability in such cases, and as to the liability of sureties upon his official bond given after the passage of the statute.

[2] Ross *v.* Williams, 11 Heisk., 410.

CHAPTER VI.

OF THE RECEIVER'S POSSESSION.

I. Nature of Receiver's Possession.

§ 134. The precise nature of the possession held by a receiver of the property or estate entrusted to his charge is frequently a question of much importance in determining the relative rights of conflicting claimants to and parties interested in the property. The general proposition is well established, that, the receiver being the officer or agent of the court from which he derives his appointment, his possession is exclusively the possession of the court, the property being regarded as in the custody of the law, *in gremio legis*, for the benefit of whoever may be ultimately determined to be entitled to its possession.[1] The receiver's possession, therefore, is neither adverse to the plaintiff nor to the defend-

[1] See Robinson *v.* Atlantic & Great Western R. Co., 66 Pa. St., 160; Skinner *v.* Maxwell, 68 N. C., 400; De Visser *v.* Blackstone, 6 Blatchf., 235; Mays *v.* Rose, Freem. (Miss.), 703; Angel *v.* Smith, 9 Ves., 335. So strictly was this doctrine adhered to by Lord Eldon, that he observed in the case last cited, that, after tenants of real estate had attorned to a receiver appointed over the premises, the court itself became the landlord. But it was said by Mr. Justice Hargreave, in the Landed Estates Court of Ireland, *In re* Butler's Estate, 13 Ir. Ch., N. S., 456, that "the general principle is, that the possession of the receiver is that of all parties to the suit, according to their titles. As between the owner and incumbrancers, it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced, and a third party, it is the possession of the former. The receiver is in fact his agent; all the rents are applied to his use, either by paying his debts, or paramount charges, or by being handed over to him."

ant in the litigation, being only the possession of the court, which holds the property for the greater safety of all parties in interest, the primary object being to secure the thing in controversy, so that it may be subject to such disposition as the court may finally direct.[1] And the receiver of a court of chancery being regarded as its executive officer, in much the same light in which a sheriff is the executive officer of a court of law, the property in his possession is regarded as in the custody of the law, to the same extent as if levied upon under an execution or attachment.[2] As illustrating the doctrine that the receiver's possession is the possession of the court appointing him, it was said in an English case that after tenants of real estate had attorned to the receiver appointed over the premises, the court itself became the landlord.[3] But when property is in the actual possession of a receiver, he is regarded as having such a special interest therein that the ownership may be averred in him in an indictment for larceny of the property.[4]

§ 135. It is sometimes asserted as a general principle in the reported cases, that a receiver being appointed primarily for the benefit of all parties in interest, his possession will be treated as the possession of the party who is ultimately determined to be entitled thereto, and that when the question of right is finally determined, the possession of the party prevailing becomes exclusive throughout the whole period, by relation to the date of the receiver's appointment.[5] While this principle is true to a limited extent, as that if any benefit is to ensue to the successful party from the mere act of possession, he will be regarded as having been in possession from the first, and none of his rights will be lost because of the receiver's possession, the principle will not be carried to the extent of prejudicing his rights. And when possession of the property in dispute has been

[1] Mays *v.* Rose, Freem. (Miss.), 703.

[2] Blodgett, J., *In re* Merchants Insurance Co., 3 Biss., 165.

[3] Angel *v.* Smith, 9 Ves., 337.

[4] State *v.* Rivers, 60 Iowa, 381.

[5] See Beverley *v.* Brooks, 4 Grat., 212; Sharp *v.* Carter, 3 P. W., 375.

taken away from defendant by injunction, and the property has been put into the hands of a receiver, the injunction rendering the appointment of a receiver indispensable for the protection of all parties, if defendant is finally adjudged to be entitled to possession and the injunction is dissolved, the receiver's possession during the interval will not be treated as that of defendant, so as to prevent him from claiming and recovering damages because of the injunction.[1] But when plaintiff, in a bill to recover possession of real estate, obtains a receiver as against defendant, and obtains a verdict in his favor in an action of ejectment to try the title, and the receiver is then ordered to surrender possession to the plaintiff, the receiver's possession will not be deemed that of the defendant, but rather of the plaintiff, who appears to be entitled to the premises.[2] And where a receiver of mortgaged premises has been directed to pay the balance in his hands to a mortgagee, and to pass his accounts preliminary to his final discharge, but remains in possession after such order, paying the rents to the mortgagee, his possession after the date of the order will be regarded as that of the mortgagee himself.[3] But it would seem that the appointment of a receiver does not so alter possession of the estate in the person who is ultimately found to have been entitled thereto at the time of appointment, as to prevent the statute of limitations from running during the dispute as to the right.[4]

§ 136. As regards the precise time when the receiver's title and right of possession attach to property which is the subject of the receivership, the better rule would seem to be, as held in New York, that they vest by relation back to the date of the original order for the appointment, although the proceedings may not be perfected until a later date; and that the receiver's title and right to possession during the interval between such original order and the time of

[1] Sturgis *v.* Knapp, 33 Vt., 486.

[2] Sharp *v.* Carter, 3 P. W., 375.

[3] Horlock *v.* Smith, 11 L. J., N. S. Ch., 157; S. C., 6 Jur., 478.

[4] Anonymous, 2 Atk., 15.

perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval.[1] Thus, when an order of reference is made to a master in chancery for the appointment of a receiver, and the appointment is afterwards made under and pursuant to such order, the receiver's title will be held to have vested as of the date of the original order, and to have attached upon all property to which the receivership could extend, in like manner and with the same effect as if the original order had named the receiver, instead of directing a reference for that purpose.[2] So when the order appointing him provides that, before entering upon the discharge of his duties, the receiver shall execute a bond with sureties, and between the time of such order and the execution of the bond the sheriff levies upon the property, under an execution against the defendants, the receiver's title and right to possession, on perfecting his bond, take effect back to the date of his appointment, and the sheriff will be required to surrender possession of the property to the receiver.[3] It is to be observed, however, that the receiver's title does not take effect back to the time of beginning the action in which he was appointed, so as to defeat a levy by the sheriff under a judgment recovered against the defendant prior to the receiver's appointment.[4] And when the order appointing a receiver requires him to give a bond before proceeding to act as receiver, until such bond is given he can not maintain an action to recover possession of the property over which he is appointed.[5] And when the order appointing him is stayed by an appeal and *supersedeas*, the property will not be deemed in the custody of the law until actually reduced to possession by the receiver after the affirmance of his appointment upon the appeal, until which time it remains in

[1] Rutter *v.* Tallis, 5 Sandf., 610; Steele *v.* Sturges, 5 Ab. Pr., 442. See, *contra*, Farmers Bank *v.* Beaston, 7 G. & J., 421.

[2] Rutter *v.* Tallis, 5 Sandf., 610.

[3] Steele *v.* Sturges, 5 Ab. Pr., 442; Maynard *v.* Bond, 67 Mo., 315.

[4] Artisans Bank *v.* Treadwell, 34 Barb., 553.

[5] Phillips *v.* Smoot, 1 Mackey, 478.

the custody of the original defendant, who is authorized to make necessary contracts for its preservation and for the protection of his rights.[1]

§ 137. In Maryland, it is held that the appointment of receivers, and executing bonds for the faithful performance of their duties, will not operate to sequestrate the property of defendant, or debts due to him, until actually reduced to the receiver's possession. And an indebtedness due to a person over whose affairs receivers have been appointed, but who have not taken possession, may be garnished, notwithstanding such appointment. The reason for the rule is said to be, that the defendant's effects not being in possession of the court until taken into the receiver's custody, the court can not interpose its summary jurisdiction to punish any interference with the possession. And it is held that the period when the effects of the defendant are to be considered as under protection of the court, so as to preserve them from attachment, is the time when the court may interpose by attachment to punish a disturbance or interference with the receiver's possession.[2]

§ 138. It is important to observe that the receiver's possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith.[3] And when creditors have obtained judgments against their debtor, which are a lien upon his real estate, prior to the appointment of a receiver of the debtor's property and estate, the receiver is seized of the land subject to the lien of the judgments.[4] So where creditors obtain judgment and levy upon the property of the debtor, and a receiver is afterwards appointed, who takes possession of the property and sells it, the sheriff

[1] Cook *v.* Cole, 55 Iowa, 70.

[2] Farmers Bank *v.* Beaston, 7 G. & J., 421.

[3] Gere *v.* Dibble, 17 How. Pr., 31; *In re* North American Gutta Percha Co., id., 549; S. C., 9 Ab. Pr., 79; Rich *v.* Loutrel, 18 How. Pr., 121. And see Bowling Green Savings Bank *v.* Todd, 64 Barb., 146; Lorch *v.* Aultman, 75 Ind., 162. And see Von Roun *v.* Superior Court, 58 Cal., 358.

[4] Gere *v.* Dibble, 17 How. Pr., 31.

who made the levy is entitled to the proceeds of such sale.[1] So a receiver can not maintain replevin for property which has been levied upon and reduced to possession by creditors having a paramount lien.[2] And the appointment of a receiver over property which is subject to taxation in no manner affects or impairs a lien upon the property for taxes.[3] The principle extends, also, to choses in action of the defendant which pass to a receiver by virtue of his appointment, and he takes them subject to existing liens thereon. For example, where attorneys of a bank are employed to foreclose a mortgage, and pending the foreclosure a receiver is appointed of the affairs of the bank, the receiver takes title to the mortgage or its proceeds, subject to the lien of the attorneys for their services, although such services can not be urged by way of set-off. The right of the attorneys in such case is dependent upon the common-law lien which an attorney has for his fees upon the papers of his client, as well as upon the proceeds of the litigation, and the attorneys will be required to pay to the receiver only the balance of the proceeds, after deducting their fees. But an individual member of the firm of attorneys can not, in such a case, be allowed any lien upon the proceeds of the foreclosure suit, as against the receiver, for an amount due him for services rendered the bank by him individually.[4]

§ 139. The possession of the receiver being, as already shown, regarded as the exclusive possession of the court from which he derives his appointment, the courts are exceedingly averse to allowing any unauthorized interference therewith, and will not tolerate any attempt to disturb him in his rightful possession, without leave of court being first obtained for that purpose.[5] And when a person claiming

[1] *In re* North American Gutta Percha Co., 17 How. Pr., 549; S. C., 9 Ab. Pr., 79; Rich *v.* Loutrel, 18 How. Pr., 121.

[2] Conley *v.* Deere, 11 Lea, 274.

[3] Union Trust Co. *v.* Weber, 96 Ill., 346.

[4] Bowling Green Savings Bank *v.* Todd, 64 Barb., 146.

[5] Evelyn *v.* Lewis, 3 Hare, 472; Angel *v.* Smith, 9 Ves., 335; Russell *v.* East Anglian R. Co., 3 Mac. & G., 104; Ames *v.* Trustees of Birkenhead Docks, 20 Beav., 332;

any interest in the subject-matter of the litigation is prejudiced by the appointment of a receiver, or desires to assert his rights, the proper course is for the court either to give him leave to bring an action, or to permit him to be examined *pro interesse suo*, the latter being generally regarded as the most convenient and desirable practice.[1] Thus the court will not permit a claimant of real estate which is in possession of its receiver, to bring an action of ejectment without first obtaining leave for that purpose.[2] And ordinarily, when real estate is in the actual possession of a receiver, an action of ejectment will not be maintained against him in another court, but the claimant will be permitted to pursue his remedy against the receiver in the action in which he was appointed.[3] And if property or funds in the receiver's possession are claimed by third persons not parties to the action in which he was appointed, a petition or motion may be presented to the court for an order on the receiver to deliver over the fund or property to the claimant.[4] The remedy of a person claiming title to the property is not to regain it by an act of trespass, but to apply to the court for redress or for leave to sue the receiver.[5] And in thus restricting claimants or third parties from interfering with the receiver's possession without leave, the rule is applied regardless of whether such persons claim paramount to or under the right which the receiver was appointed to protect.[6]

§ 140. This exclusive possession of the receiver may be and frequently is protected by the aid of an injunction re-

Brooks *v.* Greathed, 1 Jac. & W., 176; DeWinton *v.* Mayor of Brecon, 28 Beav., 200; Spinning *v.* Ohio Life Insurance and Trust Co., 2 Disney, 368; Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792; *Ex parte* Cochrane, L. R., 20 Eq., 282.

[1] Brooks *v.* Greathed, 1 Jac. & W., 176; Brien *v.* Paul, 3 Tenn. Ch., 357. See, also, Skinner *v.* Maxwell, 68 N. C., 400.

[2] Angel *v.* Smith, 9 Ves., 335.

[3] Fort Wayne, M. & C. R. Co. *v.* Mellett, 92 Ind., 535.

[4] Riggs *v.* Whitney, 15 Ab. Pr., 388.

[5] *In re* Day, 34 Wis., 638; *Ex parte* Cochrane, L. R., 20 Eq., 282.

[6] Evelyn *v.* Lewis, 3 Hare, 472.

straining any unauthorized interference with the property, or the unauthorized prosecution of suits against the receiver for its recovery.[1] And when a claimant is asserting his title by an action at law to property held by a receiver, without having obtained leave of the court to institute such action, he may be enjoined, on the application of the receiver, from proceeding with his action, regardless of however clear his right may be, or of whether he was apprised of the receiver's appointment when he brought his action at law;[2] since the claimant, although he may have a clear legal right to the property, will not be allowed to disturb the receiver's possession until he has established his right by proper proceedings for that purpose. Thus, when a receiver is appointed over certain church property, and a churchwarden, claiming to be legally entitled thereto, takes possession by force and prevents the minister from holding religious services, an injunction may be granted to restrain such unauthorized interference with the receiver's possession.[3] And an injunction is sometimes granted, although the party enjoined is proceeding in the exercise of a right given by statute. Thus, where real estate is in possession of a receiver, and a railway company, desiring a portion of it for the construction of its road, institutes proceedings for condemnation in accordance with statute, but without obtaining leave of the court before interfering with the receiver's possession, an injunction may be granted restraining the company from proceeding until further order of court.[4]

§ 141. So extremely jealous are courts of equity of any interference, *pendente lite*, with the possession of their receivers, that they will not ordinarily permit property which is the subject of the receivership to be sold on execution.[5]

[1] Tink *v.* Rundle, 10 Beav., 318; Attorney-General *v.* St. Cross Hospital, 18 Beav., 601; Evelyn *v.* Lewis, 3 Hare, 472; Johnes *v.* Claughton, Jac., 573.

[2] Evelyn *v.* Lewis, 3 Hare, 472.

[3] Attorney-General *v.* St. Cross Hospital, 18 Beav., 601.

[4] Tink *v.* Rundle, 10 Beav., 318.

[5] Robinson *v.* Atlantic & Great Western R. Co., 66 Pa. St., 160; Skinner *v.* Maxwell, 68 N. C., 400;

And when a sheriff has levied upon property in the hands of a receiver, equity will not interpose by an injunction in behalf of the sheriff, to restrain an action at law against him for such interference.[1] The proper remedy for a judgment creditor, who desires to question the receiver's right to the property, is to apply to the court appointing him, to have the property released from the receiver's custody, in order that he may proceed against it under his judgment;[2] since to permit the property, while in custody of the receiver, to be levied upon and sold under the process of another court, would at once give rise to a conflict of jurisdiction and would seriously interfere with and impair the receiver's right to the management of the property.[3] So when real estate is in the actual possession of a receiver, pending litigation as to the title, it is not subject to levy and sale under execution to satisfy a judgment rendered subsequent to the receiver's appointment.[4] And when the judgment was obtained before the appointment, but the lien was not acquired by placing an execution in the hands of the sheriff until after the appointment, it was held that a purchaser under the execution sale, the real estate being then in the receiver's possession, and the sale being made without leave of court, acquired no title, and the court refused to put him into possession.[5] And while the principle, as above stated, is not understood as prohibiting absolutely the acquisition of new rights to the fund or property in controversy, pending the receiver's possession, it yet prevents the person so acquiring rights from asserting them by the process of another court, thus compelling him to apply to the court having jurisdiction over the property and the receiver, for a determination of his rights. And it matters

Wiswall *v.* Sampson, 14 How., 52; Edwards *v.* Norton, 55 Tex., 405.

[1] Try *v.* Try, 13 Beav., 422.

[2] Robinson *v.* Atlantic & Great Western R. Co., 66 Pa. St., 160; Dugger *v.* Collins, 69 Ala., 324. See Wiswall *v.* Sampson, 14 How., 52.

[3] Robinson *v.* Atlantic & Great Western R. Co., 66 Pa. St., 160.

[4] Edwards *v.* Norton, 55 Tex., 405.

[5] Dugger *v.* Collins, 69 Ala., 324.

not, in such case, that the receiver has declined to act, since the property is still in custody of the law.[1]

§ 142. As still further illustrating the aversion entertained by courts of equity toward any interference with the possession of their receivers, it is held that a receiver is not justified in paying out money in any other manner than upon the order of the court appointing him, and that this court will not sanction a payment made by the receiver, even upon the compulsory process of another court. And when a judgment creditor has attached money in the hands of a receiver, under proceedings instituted in a court of law, and has obtained an order therein for payment of the money attached, which order is obeyed by the receiver, such payment will not be allowed by the court in passing his accounts.[2]

[1] Skinner *v.* Maxwell, 68 N. C., 400. The court, Rodman, J., say, p. 404: "When a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient for the court of law, or any other court, by its process, to interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest *pendente lite*, while he can not interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard. The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say that, while the property is in the hands of a receiver, no right to it can be acquired by sale under execution. And it makes no difference that the receiver appointed declined to act; the property was nevertheless in the custody of the law."

[2] De Winton *v.* Mayor of Brecon, 28 Beav., 200. Lord Romilly, Master of the Rolls, observes, p. 202: ". . I apprehend this is clear, that the court never allows any person to interfere, either with money or property in the hands of its receiver, without its leave; whether it is done by the consent or submission of the receiver, or by compulsory process against him. The court is obliged to keep a strict hand over property in the hands of a receiver, or which, by virtue of the order of the court, may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties. It is always to be remembered that the receiver in this case

§ 143. Courts of equity will not permit any unauthorized interference with the possession of their receivers to be justified upon the ground that the appointment of the receiver was ill-advised or illegal, and that the parties interfering were, therefore, not bound to regard it. It is sufficient that there is a subsisting order of the court appointing a receiver; and parties dissatisfied therewith, or deeming such order erroneous, must take the proper course to question its validity by application to the court itself, and it is not competent for any person to interfere with the receiver's possession upon the ground that his appointment was improvidently made.[1] The appropriate course in all cases, where parties are desirous of obtaining possession of property which has come into the hands of a receiver, is to apply to the court from which he derives his appointment; and the rule is not limited to property actually in the receiver's possession, but extends also to property which he has been appointed to receive, but which he has not yet reduced to possession.[2]

would not have got a penny, except by the order of the court enabling him to receive it, and entitling him to give a good discharge to the person who paid it; and, consequently, it is strictly money belonging to the court of chancery, and the receiver can only discharge himself by paying it in obedience to the direction and order of that court."

[1] Russell *v.* East Anglian R. Co., 3 Mac. & G., 104; Ames *v.* Trustees of Birkenhead Docks, 20 Beav., 332; Cook *v.* Citizens National Bank, 73 Ind., 256.

[2] Ames *v.* Trustees of Birkenhead Docks, 20 Beav., 332. "There is no question," says Lord Romilly, Master of the Rolls, p. 353, "but that this court will not permit a receiver, appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous; this court requires and insists that application should be made to the court for permission to take possession of any property of which the receiver either has taken or is directed to take possession, and it is an idle distinction (which could not be maintained if it were attempted, which it is not by counsel at the bar, though suggested by the affidavits), that this rule only applies to property actually in the hands of the receiver. If a receiver be appointed to receive debts, rents or tolls, the rule applies equally to all these cases, and no person will be permitted, without the sanction or authority of the court, to intercept or prevent payment to the receiver of the debts,

§ 144. The receiver, being the officer or agent of the court, is entitled to its assistance in obtaining possession of property which is the subject-matter of his receivership, and may have an order of court to procure possession of such property, not only against defendant in the action, but in a proper case against his agents and employes, although not parties to the record, requiring them to deliver up the specific property.[1] And when a receiver is appointed over real property, of which the owner is in possession, the proper course is to apply to the court to have the owner deliver possession to the receiver, since the latter can not distrain upon the owner in possession, as he is not a tenant of the receiver.[2] Such procedure does not conflict with the principle that no man shall be deprived of his property without due process of law, since the surrender to the receiver does not affect the ultimate question of the right to the property, any more than does the levy of an attachment; the purpose being merely to secure the property by getting it into the receiver's possession, so that it may be safely delivered to the party who shall be finally determined to be entitled thereto.[3] And the order for the surrender of property to the receiver may, if necessary, be enforced by process of attachment.[4] And when a receiver has been appointed to take charge of certain trust funds held by defendant, the court may require defendant's attorney to appear before the receiver, and to deliver to him all the trust property which may have come to his hands since the suit was instituted, and to compel him to render an account and inventory of such property, and to verify it under oath.[5] So when a party to the cause executes a lease of real property to a third person, both lessor and lessee having full knowledge

rents or the tolls, which he has not actually received, but which he is appointed to receive." Green *v.* Green, 2 Sim., 430. See, also, Miller *v.* Jones, 39 Ill., 54.

[1] *In re* Cohen, 5 Cal., 494. See, also, Geisse *v.* Beall, 5 Wis., 224;

[2] Griffith *v.* Griffith, 2 Ves., 400.

[3] *In re* Cohen, 5 Cal., 494.

[4] Miller *v.* Jones, 39 Ill., 54.

[5] Geisse *v.* Beall, 5 Wis., 224.

that a receiver has been appointed over the property, however valid such lease may be as between the parties, it confers no right as against the receiver, and he is entitled to a writ of possession as against the lessee.[1]

§ 145. It is to be borne in mind, however, in considering the extent to which a court of equity will aid its receiver to obtain possession of property, that the court is always reluctant to interfere with the right of possession by parties claiming a legal title to the property.[2] And while it is competent for the court, by an interlocutory order, to take possession of property by its receiver pending litigation concerning the rights of the parties, yet when the rights of third persons have intervened who are not parties to the record, as in the case of purchasers in good faith of the property in contest, the court will decline to take possession by its receiver. The interference is withheld under such circumstances, upon the ground that the rights of purchasers in good faith are not to be adjudicated and determined by the summary method of an order to surrender possession to a receiver.[3] And when the plaintiff seeks to have an actual delivery of defendant's property to the receiver, some of which is claimed by a third person under an assignment from defendant, the question as to what property is under defendant's control must first be determined, before he will be directed to deliver it to the receiver.[4] So when a banker, holding a specific fund in his possession, makes an assignment for the benefit of his creditors, and a receiver is afterward appointed over the fund in question, the court will not upon summary motion compel the assignees to pay the money to the receiver.[5] And the court will not, upon a summary application, compel a delivery to the receiver of prop-

[1] Thornton *v.* Washington Savings Bank, 76 Va., 432.

[2] Cassilear *v.* Simons, 8 Paige, 273; McCombs *v.* Merryhew, 40 Mich., 721.

[3] Levi *v.* Karrick, 13 Iowa, 344.

[4] Cassilear *v.* Simons, 8 Paige, 273. And see Parker *v.* Browning, 8 Paige, 389.

[5] Coleman *v.* Salisbury, 52 Ga., 470.

erty purchased at a sheriff's sale, under execution against the defendant, when the purchaser's agent is shown to be exercising control over the property, with the power of reducing it at any time to actual possession. Under such circumstances, the court will first require the purchaser to be made a party to the litigation, that he may have an opportunity to defend his title and right of possession.[1]

§ 146. When a receiver is in possession of real estate *pendente lite*, although the court will not permit his possession to be interfered with by third persons without its consent, such persons will be permitted to come in and be heard with reference to their interests, and such orders will be made as are necessary to protect their rights in the subject-matter of the litigation, until they can be finally determined. For example, when a receiver is appointed over the premises in controversy, and a third party is entitled to a portion of the premises in right of his wife, but a proceeding for divorce is pending on the part of the wife against the husband, in which she claims the entire rents and profits, while the court will not determine the relative rights of the husband and wife upon an application for payment of the money to the former, it will direct the receiver to pay that portion of the rents into court, to await the result of the litigation between husband and wife.[2] And when a receiver had been appointed of the rents and profits of real estate in behalf of a person having a life estate therein, and directed to pay the rents to such person, and in another action an order for costs had been made against the same tenant for life, the court gave the successful party leave to prosecute proceedings for costs against the life estate, notwithstanding the appointment and possession of the receiver.[3]

§ 147. Under the practice of the English Court of Chancery, when it was sought to compel a defendant to deliver up possession of lands to a receiver appointed in the cause, an order was first obtained to deliver possession, and a writ

[1] Robeson *v.* Ford, 3 Edw. Ch., 441.

[2] Vincent *v.* Parker, 7 Paige, 65.

[3] Gooch *v.* Haworth, 3 Beav., 428.

of execution of such order was then served upon defendant. And until this was done no further order would be made by the court.[1]

§ 148. Under the former chancery practice in New York, when a receiver was appointed and invested under decree of the court with the title to real and personal property in controversy, and defendants were required by the decree to deliver the property to the receiver, it was held that he himself might take the necessary steps to obtain possession and control of the property, and that he need not wait for the parties to the litigation to move in the matter, it being his duty to protect and preserve the property for the interests of all parties concerned.[2]

§ 149. While a court of equity will, in a proper case, freely extend its aid by a writ of assistance, to enable a receiver to obtain possession of property to which he is entitled, it will not thus interfere upon mere motion, as against the possession of a stranger to the action, claiming a superior title under which he holds possession, but will leave the disputed question of title to be determined by an action for that purpose. For example, when a receiver is in possession of property under appointment from a United States court, the state courts will not grant a writ of assistance to a subsequently appointed receiver in the state tribunal, to enable him to get possession of the same property. The possession of the receiver appointed by the federal court, in such a case, is regarded as the possession of a stranger, whose rights can not be determined arbitrarily and upon a mere motion, but only by a regular action at law. And it can make no difference that the jurisdiction of the federal court, to entertain the action in which its receiver was appointed, is assailed and denied, since that is a question of

[1] Green *v.* Green, 2 Sim., 430. See, also, Griffith *v.* Griffith, 2 Ves., 400.

[2] Iddings *v.* Bruen, 4 Sandf. Ch., 417. And see this case for a review of the authorities, English and American, upon the right of the receiver to initiate any action concerning his receivership.

too great importance to be disposed of merely by a motion in the state court.[1]

§ 150. While it is true, when property is legally and properly in possession of a receiver, that it is the duty of

[1] Gelpeke *v.* Milwaukee & Horicon R. Co., 11 Wis., 454. "I know of no case," says Dixon, C. J., page 457, "where it has been adjudged that the possession of a stranger, who sets up a superior title, in pursuance of which he claims to have entered and to hold, might be thus disturbed. In such cases it has been the uniform rule to leave the parties to their remedies by action. And in this case I think that the circuit judge erred in proceeding to award the writ as against Mr. Ward, when it appeared that he was in possession by virtue of the order of the district court, made in a proceeding to foreclose a mortgage which had been previously executed by the corporation defendant. When this was made to appear, he should have arrested the proceeding, and turned the parties over to their appropriate remedy by action. His attempt to adjudicate upon and settle the rights of Mr. Ward, upon a mere motion, supported by affidavits, was unauthorized. Such was not the proper mode of proceeding by which to determine his rights. It is only adapted to those cases where the court can say, clearly and unhesitatingly, that the possession is subsequent to the commencement of the action, and subject to the decree or order which has been made, or that the person holding the same has no legal right. And it could make no difference that the jurisdiction of the district court (of the United States) to entertain those actions was assailed and denied. That, too, was a question of great gravity and importance, and not to be disposed of with the same speed and facility that we would strike out an obviously frivolous answer or demurrer. It was one which admitted of, at least, some doubt, and upon either side of which the most learned counsel would not think it unbecoming or improper to spend many hours or days in earnest argument, before any court where it should be raised. And the very fact that it would admit of such doubt or argument was sufficient to exclude it from the consideration of the court, upon such a motion. For that reason I was opposed to and refused to hear its discussion in this court upon the present motion. Courts can only act, in such cases, where the rights of the parties are obvious, and not the subjects of doubts or serious controversy. It was urged that unless the question involved could be determined in this proceeding, that then the receiver was remediless, and there was no form of action in which Mr. Ward, admitting his possession to be without warrant of law, could be deposed. I can not agree to this proposition. I think it may be done by some one of the forms of action now in use."

the court to protect that possession, not only as against acts of violence, but in some instances even against actions at law, so that a third person claiming the property may be compelled to come in and be examined *pro interesse suo* in the original action; yet the case is different if the property is in possession of a third person, under claim of right, and is forcibly taken from his possession by the receiver without any order of court. Under such circumstances, neither the order of court appointing the receiver, nor the construction of its order, being in question, and a complaint being made of misconduct on the part of an officer of the court, acting under color of authority merely, the court may, in its discretion, either take cognizance of the complaint and do justice between its officer and the party aggrieved, or it may permit the latter to bring an action at law for his alleged injury. And the latter course would seem to be preferable, in order that the benefit of a trial by jury may be had.[1]

[1] Parker *v.* Browning, 8 Paige, 388. This was an appeal by a receiver from an order allowing certain petitioners to bring an action against the receiver, and other persons acting under him, for an alleged trespass in forcibly entering a store which petitioners claimed to belong to them and to be in their possession, and taking the goods therefrom. Walworth, Chancellor, says, p. 389: "There is certainly room for doubt in this case, whether the defendant Browning had not some interest in the store of goods. And if the receiver had taken possession thereof under the express directions of the court, or if the master had decided that the goods were in the possession and under the power and control of the defendant, and had directed him to deliver the possession thereof to the receiver, this court ought to have assumed the exclusive jurisdiction over the subject of complaint, instead of suffering its officer to be harassed in a suit at law for obeying its order. But as I understand the case, the validity of the order appointing the receiver is not in controversy here, nor is his right to take the property of the defendant Browning, as such receiver, intended to be questioned. The petitioners, on the contrary, claim that the receiver, without any direction to that effect from the court, has forcibly taken goods which belong to them exclusively, out of their possession, under the pretense that such goods were the property of the defendant Browning. Where the authority of the court or the construction of its order is not in question, but the complaint is made against the misconduct of its officer, acting under color of authority merely, this

§ 151. The receiver's possession being the possession of the court from which he derives his appointment, he is not

court may, in its discretion, either take to itself the cognizance of the complainant and do justice between its officers and the parties aggrieved, or it may permit the latter to bring a suit at law for the alleged injury. And in cases of this description it is more in accordance with the spirit of our institutions to permit the parties complaining to proceed at law, where they may have the benefit of a jury trial, than to attempt to settle their rights by a reference to a master. It is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of this court; as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself, by force, and without an express order of the court directing him to do so. The proper course, as this court has repeatedly decided, where the defendant is directed to deliver over his property to the receiver under the direction of a master, is for the receiver, or the party who wishes for an actual delivery of the property in addition to the legal assignment thereof, to call upon the master to decide, upon the examination of the defendant, and on the evidence before him, what property legally or equitably belonging to the defendant, and to which the receiver is entitled under the order of the court, is in the possession of the defendant or under his power and control. And it is the duty of the master to direct the defendant to deliver over to the receiver the actual possession of all such property, in such manner and within such time as the master may think reasonable. Where such a direction is given, the defendant, if he is dissatisfied with the decision of the master, must apply to the court to review the same, or he will be compelled by process of contempt to comply with that decision. And if the property is in the possession of a third person who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed. Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence but also against suits at law; so that a third person, claiming the same, may be compelled to come in and ask to be examined *pro interesse suo*, if he wishes to test the justice of such claim. But where the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts by violence to obtain possession, any further than the law will protect him; his right

subject to process of garnishment as to funds in his hands or subject to his control, and such process will be regarded as a nullity when directed against him.[1] And when a receiver is duly appointed of the effects of a copartnership, in an action brought by a creditor of the firm, he can not be garnished by judgment creditors of the firm, as to partnership assets in his hands, such assets not being subject to garnishee process.[2] So where receivers are appointed over an insolvent corporation, they are not liable to garnishee process, since the property which they hold is entrusted to them, not by act of the party, but by operation of law.[3] The court of equity being the actual custodian of the property or fund in litigation, it will not yield its jurisdiction to a court of law and permit the right to the property to be there tried. In other words, since the receiver's possession is that of the court, it will not permit itself to become a suitor in another forum concerning the property in question. And an additional reason for holding the receiver not subject to process of garnishment is, that such liability, if recognized, would defeat the very ends for which he was appointed, since a judgment at law upon the garnishment

to take possession of property of which he has been appointed receiver being unquestioned."

[1] Field *v.* Jones, 11 Ga., 413; Taylor *v.* Gillean, 23 Tex., 508; Richards *v.* People, 81 Ill., 551; Blake Crusher Co. *v.* New Haven, 46 Conn., 473; Cooke *v.* Town of Orange, 48 Conn., 401; Commonwealth *v.* Hide & Leather Insurance Co., 119 Mass., 155. See, also, Columbian Book Co. *v.* De Golyer, 115 Mass., 67; Smith *v.* McNamara, 15 Hun, 447. Notwithstanding the doctrine of the text is well established, both upon principle and authority, it is held in Colorado that receivers over a railway company, appointed beyond the state but operating a railroad within the state, are subject to garnishee process when such proceeding does not tend to disturb the rights of the receivers under the general orders of the court by which they were appointed. Phelan *v.* Ganebin, 5 Col., 14. And in such case it is held that the garnishee process may be properly served upon the agent of the receivers within the state, in like manner as service upon the agent of a foreign corporation. Phelan *v.* Ganebin, 5 Col., 14; Ganebin *v.* Phelan, 5 Col., 83.

[2] Taylor *v.* Gillean, 23 Tex., 508.

[3] Columbian Book Co. *v.* De Golyer, 115 Mass., 67. See, also, Richards *v.* People, 81 Ill., 551.

would, if recognized and sustained, entirely divest the jurisdiction of equity.[1] In Maryland, however, it has been held that an indebtedness due to the defendant, over whose effects receivers have been appointed, is subject to garnishment at any time before the receivers have taken possession.[2] This ruling, however, is plainly inconsistent with the doctrine of the courts of New York, that the receiver's title and right to possession vest by relation back to the date of the original order for his appointment, although the proceedings may not be perfected until a later date.[3]

§ 152. As regards the right of possession when two different receivers have been appointed, in different proceedings, over the same fund or estate, the question of priority or precedence must be determined with reference to the date of appointment, since the courts will not permit both to act, the title of the one being necessarily exclusive of that of the other.[4] And in such case, where an order of reference has been made to appoint, the receiver appointed under the first order of reference will be entitled to possession, the appointment being regarded as dating back by relation to the date of the order of reference; and the appointment under proceedings begun of a later date will be treated as having been improvidently made, and the receiver under the first order will be allowed precedence.[5] When both appointments have been made on one and the same day, the court may and will inquire into fractions of the day in determining the question of priority, and that one whose appointment is of an earlier hour will be given priority. And the question of precedence being determined adversely to the receiver in actual possession of the assets, he will be required to surrender possession to the other.[6] In no event

[1] Field *v.* Jones, 11 Ga., 413.

[2] Farmers Bank *v.* Beaston, 7 G. & J., 421.

[3] See Rutter *v.* Tallis, 5 Sandf., 610; Steele *v.* Sturges, 5 Ab. Pr., 442.

[4] People *v.* Central City Bank, 53 Barb., 412; S. C., 35 How. Pr., 428; Deming *v.* New York Marble Co., 12 Ab. Pr., 66.

[5] Deming *v.* New York Marble Co., 12 Ab. Pr., 66.

[6] People *v.* Central City Bank, 53 Barb., 412; S. C., 35 How. Pr., 428.

will a receiver appointed in the subsequent action be justified in interfering with the possession already acquired by the former receiver, without some order or direction of the court.[1]

§ 153. As between the right of possession of a receiver and of assignees of the same estate under subsequent proceedings in bankruptcy, the doctrine of the English Chancery is, that the appointment of the receiver will not be superseded nor his possession defeated by the bankrupt proceedings. The appointment of the receiver is regarded as a discretionary power, exercised by the court of chancery with as great utility as any power belonging to it, and the receiver first appointed by that court is entitled to possession, and the assignees in bankruptcy and all others will be required to surrender possession to him.[2]

§ 154. While the appointment of a receiver over real property does not interfere with the exercise of rights of common then actually enjoyed by other parties, yet if the receiver has taken possession the court will not, as against such possession, permit the exercise of an alleged right of common which had been abandoned for several years. And in such a case, where the person claiming the right of com-

[1] Ward *v.* Swift, 6 Hare, 309.

[2] Skip *v.* Harwood, 3 Atk., 564. This was an action by one partner, after a dissolution, for an account and a receiver of the partnership assets. Subsequent to the appointment of the receiver, one member of the firm was adjudicated a bankrupt, and his assignees obtained possession of a portion of the firm assets, which the bankrupt had clandestinely conveyed away from the receiver. The assignees insisted that they were entitled to possession, and that the partner who had obtained the receiver must come in and share *pari passu* with the creditors. Lord Hardwicke said: "A judgment creditor, to be sure, has no preference under commissions of bankruptcy, though execution has been taken out, if not actually executed; but then a commission of bankruptcy can not supersede a decree of this court for a receiver, which is of a different consideration, and is a discretionary power exercised by this court with as great utility to the subject as any sort of authority that belongs to it, and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled, and does not at all affect the right."

mon had turned his cattle into a part of the estate, and the receiver had impounded them, but he persisted in the trespass and brought an action of replevin for the cattle, he was enjoined from further trespassing upon the property, and from further prosecuting his action of replevin, but was given leave to go before a master and be examined, *pro interesse suo*, as to the right claimed.[1]

§ 155. Where a person doing business as an auctioneer is in the habit of depositing the proceeds of sales made by him, in the course of his business, in bank to his own credit, and in his own name, and a customer of the auctioneer, familiar with this method of doing business, has permitted the auctioneer to deposit money arising from the sale of his goods, with his own funds in bank, without objecting thereto, as against such a customer the receiver of the auctioneer is entitled to the whole fund in bank, which becomes vested in him by virtue of his appointment, and the customer becomes merely a general creditor of the auctioneer.[2]

§ 156. With reference to the right of a landlord to distrain for rent due from a defendant, upon goods of the defendant which have passed into the possession of his receiver, it is held, where the property is actually removed by the receiver from the demised premises before the landlord attempts to exercise his right of distraint, that the landlord's right has terminated with the removal of the goods. In such a case, therefore, if the receiver has done no act to indicate his acceptance of the lease, the landlord has no right to follow the goods, which belong to the receiver and are not the property of the defendant at the time of their removal.[3]

§ 157. A receiver appointed to sell the property of a decedent, pending litigation concerning the administration of his estate, is not entitled to possession of a fund held by a creditor of the deceased as security for certain liabilities of the holder as an indorser for the deceased. The holder of

[1] Johnes *v.* Claughton, Jac., 573.

[2] Levy *v.* Cavanagh, 2 Bosw., 100.

[3] Martin *v.* Black, 9 Paige, 641.

such a fund, having acquired a legal title thereto by agreement with the deceased, will not be compelled to surrender his title to a receiver, especially when it is not shown that the fund is in any danger.[1]

§ 158. Where, pending litigation concerning a block of real estate and certain mills situated thereon, a receiver is appointed with power to take charge of the property and to perform all other duties pertaining to his office, the receiver is entitled to the possession of and to collect the wharfage due from a wharf or landing upon a river in front of the mills, which was constructed for the purpose of more conveniently conducting the business of the mills, the whole constituting in effect one property, and the receiver holding and renting it for the benefit of all parties interested in the litigation. And being thus entitled to possession, he may maintain a bill for an injunction against the authorities of a municipal corporation, who interfere with his possession and attempt to collect the wharfage.[2]

§ 159. It is to be observed as regards the possession of commercial paper by a receiver, which has come into his hands from the defendant by virtue of his appointment, that he acquires his title thereto by legal process, and not in the regular course of dealing in commercial paper. He does not, therefore, stand in the situation of a *bona fide* holder for value of such paper.[3]

§ 160. The effect of taking property from a defendant, and putting it into the possession of a receiver, would seem to be to relieve the defendant from any further responsibility concerning the property. And where, upon a bill to recover certain property consisting of slaves, a receiver is

[1] Brady *v.* Furlow, 22 Ga., 613.

[2] Grant *v.* City of Davenport, 18 Iowa, 179. It is to be observed that the statutes of Iowa provide with reference to the powers of receivers, as follows: "subject to the control of the court, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits on real property, and generally to do such acts, in respect to the property committed to him, as the court may authorize."

[3] Briggs *v.* Merrill, 58 Barb., 389.

appointed and the slaves are placed in his possession, in accordance with the prayer of the bill, the defendant from whom they are taken will not be held liable for their value, if they are afterwards emancipated by the act of the people. The property, in such case, being put into the receiver's possession is regarded as being *in custodia legis*, thereby divesting defendant of all control over it.[1]

§ 161. After the title to property has become vested in a receiver, by virtue of the order appointing him, it can not be divested merely upon the order of the court made in a proceeding to which he was not a party.[2] And where, pending litigation, property is placed in the hands of a receiver, who is vested with the usual powers of such officers, and the defendants to the litigation pray an appeal from the final decree of the court below, the effect of the appeal and giving bond thereon is not such as to warrant the court in granting an order against the receiver, to turn over the property and money in his hands, and he will still be allowed to retain possession, notwithstanding the appeal.[3]

§ 162. Where property has been in a receiver's possession pending litigation, and a final decree is made directing that a sufficient portion be set aside to satisfy the plaintiff's demand, which is accordingly done pursuant to the decree, the property thus set aside becomes that of the plaintiff, although he may refuse to receive it. And it would seem, on such a state of facts, that the receiver, having ceased to act in that capacity, holds the property thenceforth only as trustee of the person entitled thereto under the final decree.[4] And when the decision of a court of last resort dissolves an injunction against the defendant and discharges a receiver of the fund in litigation, so that defendant becomes entitled to the possession of his property, but he has, *pendente lite*, applied for the benefit of the state insolvent laws, his trustee under such proceedings becomes entitled to possession of the property, and the receiver will be re-

[1] Lee *v.* Cone, 4 Cold., 392.

[2] Rogers *v.* Corning, 44 Barb., 229.

[3] Schenk *v.* Peay, 1 Dill., 267.

[4] Very *v.* Watkins, 23 How., 469.

quired to deliver it to such trustee.[1] And when the appointment of a receiver is reversed, as having been illegal and unauthorized, the court will require him to restore the fund to the person from whom it was obtained.[2]

§ 162 *a*. While the powers and functions of a receiver are co-extensive only with the jurisdiction of the court appointing him, yet if he has rightfully obtained possession of personal property situated within the jurisdiction of his appointment, and in the discharge of his duties he takes the property into another state, his title and right of possession are not thereby divested. And in such case, an attachment will not be sustained against the property in the latter state in behalf of creditors resident there.[3]

[1] Glenn *v.* Gill, 2 Md., 1.

[2] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 380.

[3] C., M. & St. P. R. Co. *v.* Packet Co., 108 Ill., 317.

II. Interference with Receiver's Possession.

§ 163. The receiver being an officer of the court, and his possession being regarded as the possession of the court, any unauthorized interference therewith, whether by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose without the sanction of the court from which he derives his appointment, is regarded as a contempt of court, and is punished accordingly, the usual punishment to which resort is had being by attachment for contempt.[1] Thus, where an officer lev-

[1] Noe *v.* Gibson, 7 Paige, 513; De Visser *v.* Blackstone, 6 Blatchf., 235; Lane *v.* Sterne, 3 Gif., 629; Skip *v.* Harwood, 3 Atk., 564; Hull *v.* Thomas, 3 Edw. Ch., 236; Anonymous, 2 Mol., 499; Broad *v.* Wickham, 4 Sim., 511; Russell *v.* East Anglian R. Co., 3 Mac. & G., 104; Langford *v.* Langford, 5 L. J., N. S. Ch., 60; Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792; Spinning *v.* Ohio Life Insurance and Trust Co., 2 Disney, 368; Chafee *v.* Quidnick Co., 13 R. I., 442; Secor *v.* T., P. & W. R. Co., 7 Biss., 513; King *v.* O. & M. R. Co., 7 Biss., 529.

ies an execution upon property of defendants, which has already passed into the hands of a receiver, who distinctly notifies the officer in writing at the time of making his levy that such property is in his possession in his capacity of receiver, the officer is guilty of a contempt of court if he proceeds with the levy.[1] So a landlord will not be permitted to take property from a receiver's possession, under a distraint for rent due from defendant in the action in which the receiver was appointed, his proper course being to apply to the court, upon notice to the receiver, for an order requiring him to pay the rent, or that the landlord be at liberty to proceed by distraint, or otherwise, as the court may direct. And where, without such authority or sanction of the court, the landlord seizes the property under a distress warrant, both he and his officer levying the warrant will be punished by attachment for contempt of court.[2]

§ 164. The doctrine that an unauthorized interference with a receiver's possession constitutes a contempt of court necessarily results from the receiver's position as an officer of the court, acting under its authority and in all things subject to its control. Any unauthorized attempt to interfere with or to disturb his possession directly questions the power of the court appointing him, and it becomes the duty of the court to protect him, the same rule being applicable which obtains when sheriffs, trustees or masters in chancery have been invested under a judicial order with the control of property *pendente lite*. In all such cases, the power to protect the receiver or officer of the court necessarily follows from the power to appoint, and the court will extend its protection by punishing as for a contempt any unauthorized interference with the possession, even though it be by another receiver subsequently appointed by another court,

[1] Lane *v.* Sterne, 3 Gif., 629. It is said in this case, that the practice in the English Court of Chancery in such cases is not to punish the offense ordinarily by committal, but that the court uniformly requires the offending party to pay the costs and expenses occasioned by his improper conduct.

[2] Noe *v.* Gibson, 7 Paige, 513.

which had subsequently acquired jurisdiction over the matter.[1] Nor can such interference be justified by the fact that it is committed beyond the jurisdiction of the court and in another state, as by instituting attachment proceedings in another state and garnishing funds due to the receiver. And an attorney who appears for and consents to the appointment of a receiver over a corporation and assists in framing the order, and who then attaches the funds of the corporation in another state to recover for professional services, is guilty of a plain contempt of court, and will be dealt with accordingly.[2] And so jealous are courts of equity in protecting the rights of their receivers, that they will not sanction any unauthorized interference with property or funds to which the receiver is entitled, even though not yet reduced to possession.[3] Thus, one who, with full knowledge of the appointment of a receiver, attempts by garnishee proceedings to reach credits which are due to the receiver, but of which he has not yet obtained possession, will be punished for contempt of court.[4]

§ 165. The liability of one who disturbs the possession of a receiver, like that of a defendant in violating an injunction,[5] is not dependent upon the regularity or legality of the appointment, and it affords no justification for an unauthorized interference with the receiver's possession that the appointment may have been illegally or improvidently made. While the order continues in existence, the court requires that it shall receive implicit obedience, and will not permit its legality to be questioned by disobedience, the court itself being always open to any proper application calling in question the legality or propriety of its order. If,

[1] Spinning v. Ohio Life Insurance and Trust Co., 2 Disney, 368.

[2] Chafee v. Quidnick Co., 13 R. I., 442.

[3] Richards v. People, 81 Ill., 551; Hazelrigg v. Bronaugh, 78 Ky., 62.

[4] Richards v. People, 81 Ill., 551.

[5] See for a discussion of this principle in cases of injunctions, Moat v. Holbein, 2 Edw. Ch., 188; Woodward v. Earl of Lincoln, 3 Swans., 626; Richards v. West, 2 Green Ch., 456; People v. Sturtevant, 9 N. Y., 263; Sullivan v. Judah, 4 Paige, 444.

therefore, a sheriff has levied executions upon property in the custody of a receiver, the officer making the levy being fully notified and apprised of the receiver's appointment and possession, upon a motion to commit for contempt of court, the respondent can not justify his interference upon the ground that the appointment was improperly made, and the court will not, upon such a motion, consider the merits of the original order.[1] And in proceedings for contempt for inter-

[1] Russell *v.* East Anglian R. Co., 3 Mac. & G., 104. This was an appeal from an order of the Vice-Chancellor upon a motion to commit a sheriff and under sheriff for an alleged contempt of court, in having interfered with the possession of a receiver by levying upon and taking from him certain goods and chattels under a *fi. fa.*, in favor of judgment creditors of the defendants. Lord Truro observes, p. 115: "When the motion to commit was made the answer given to it was that, although the receiver, at the time of the levy, gave notice that he was in possession of the property as an officer of the court of chancery, yet that the plaintiffs in the execution considered the order, under which the receiver was appointed, an ill-advised, illegal and indiscreet order, and that therefore they were justified in treating it as a nullity. It was contended on the other side, that it was wholly irrelevant to the application whether the order was or was not such an order as this court on further consideration would deem it right to have made; that it was a subsisting order; that the officer was acting under it when he was interrupted by the sheriff; that an officer so acting under the authority of the court was entitled to the protection of the court; that if the order was incorrect in a degree which interfered with the legal rights of the plaintiffs in the execution, it was open to them to come to the court to question the propriety of that order in a proper manner, but that it was not open to them to do so by disobeying it, and by interrupting the officer of the court. The case was discussed at considerable length, and the Vice-Chancellor appears to have entertained doubts, which I think were well founded, with regard to that order; but he stated, and it appears to me correctly, that that was not the occasion on which the court could be properly called upon to decide on the validity of the objection to the order, and he therefore declined to express any determinate opinion upon that subject, intimating that they might be proper matters to be discussed hereafter. . . I have looked with care through the very numerous authorities that have been cited, but it is not necessary for me to go through them. The result appears to be this: that it is an established rule of this court, that it is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act

fering with a receiver's possession, the court will not consider whether the order appointing the receiver was erroneous, since such order can not be assailed in a collateral proceeding, if the court had jurisdiction of the parties and of the subject-matter.[1]

§ 166. It is also a well-established principle, that to render a defendant or other person liable by attachment for contempt in disturbing or interfering with property of which a receiver is entitled to possession, it is not necessary that he should be officially apprised of the receiver's appointment, or even that the formal order should have been actually drawn, provided he has actual notice of the receivership, or of the order of court directing the appointment. Any actual knowledge of the granting of the order is sufficient to fix defendant's responsibility for its violation, the same principle being applicable in such cases as in case of the violation of an injunction.[2] Thus, where defendants have knowledge of the granting of an injunction against their disposal of certain property, and the appointment of a receiver over the property, they are in contempt of court if they dispose of it, even though the order of the court is not

which this court may do, which may not be questioned in a proper form, and on a proper application; but I am of opinion that it is not competent for any one to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained. I do not see how the court can expect its officers to do their duty, if they do it under the peril of resistance, and of that resistance being justified on grounds tending to the impeachment of the order under which they are acting."

[1] Cook *v.* Citizens National Bank, 73 Ind., 256; Richards *v.* People, 81 Ill., 551.

[2] Hull *v.* Thomas, 3 Edw. Ch., 236; Skip *v.* Harwood, 3 Atk., 564; Lewis *v.* Singleton, 61 Ga., 164. And see the same doctrine discussed and applied to the violation of injunctions, in Howe *v.* Willard, 40 Vt., 654; Hearn *v.* Tennant, 14 Ves., 136; McNeil *v.* Garratt, Cr. & Ph., 98.

yet served upon them.[1] And where a defendant is present in court during the hearing of a cause, and knows that an order granting a receiver of his estates has been allowed, although the decree itself has not yet been drawn, he is guilty of a contempt of court if he removes a portion of the property and puts it beyond the receiver's possession for the purpose of evading the decree, and he can not justify on the ground that the decree has not yet been entered.[2]

§ 167. When a receiver is appointed to collect rents, it is his duty, upon being apprised by the tenants of interference with the rents by defendant, to move the court for an attachment against defendant, and the receiver's affidavit upon information and belief is sufficient foundation for the proceedings in attachment.[3] And when a person has taken forcible possession of estates over which a receiver has been appointed, an order for his commitment may be made, upon proof of service of notice of the motion, without a rule *nisi* being first obtained.[4] But when a receiver was appointed over mortgaged premises, pending an action to foreclose the mortgage, and a third person not a party to the action had collected the rents, under an assignment thereof from the owner of the equity of redemption made

[1] Hull *v.* Thomas, 3 Edw. Ch., 236.

[2] Skip *v.* Harwood, 3 Atk., 564. This was a bill between two partners, after a dissolution, for an account and a receiver. The defendant, Harwood, was present in court during the hearing, which occupied three days, and knew of the order appointing a receiver, but before the decree was drawn or entered, he removed a large portion of the firm assets. Lord Hardwicke was of opinion that, "where a person, as Mr. Harwood has done, attends a cause to which he is a defendant, the whole time of the hearing, and had notice of the decree by being present when it was pronounced in court, if he does any act that is a contravention to the decree, he is guilty of a contempt, and punishable for it, notwithstanding the decretal order is not drawn up; and there are several instances of this kind, or otherwise it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time before they can be completely drawn up." The defendant was accordingly committed to the Fleet for his contempt of court.

[3] Anonymous, 2 Mol., 499.

[4] Broad *v.* Wickham, 4 Sim., 511.

prior to the receiver's appointment, he was held not liable as for a contempt of court, although he was apprised of the receivership, the receiver having taken no steps to collect the rent or to secure the attornment of the tenant.[1] And when a third person, not a party to the suit in which a receiver is appointed over an insolvent debtor, claims title to certain property, under a conveyance from such debtor, it is not proper to determine the disputed question of title upon proceedings for contempt in collecting the rents of such property, the appropriate proceeding being by an order directing the receiver to bring an action to set aside the conveyance.[2]

§ 168. A defendant, over whose property a receiver is appointed, may be attached for contempt, if he refuses to comply with an order of court directing him to surrender all his property, under oath, to the receiver.[3] But where defendant is thus ordered to assign and deliver his property, under oath, under direction of a master in chancery, if the plaintiff seeks an actual delivery of the property in addition to a legal assignment, when a portion of it is claimed by a third person under an assignment from the debtor, he must first have the master determine what property is under defendant's control, and obtain an order upon him to deliver over such property. And until this is done, defendant is not in contempt for disobeying the order of the court.[4] And a purchaser of property at a sheriff's sale, under execution against a defendant over whose effects a receiver has been appointed, is not in contempt for refusing to comply with the order of a master, commanding him to surrender possession of the property to the receiver, if such purchaser has not been made a party to the litigation, and has had no opportunity of asserting his rights before the court.[5] And where a defendant

[1] Bowery Savings Bank *v.* Richards, 6 Thomp. & Cook, N. Y. S. C., 59; S. C., 3 Hun, 366.

[2] *Ex parte* Hollis, 59 Cal., 405.

[3] People *v.* Rogers, 2 Paige, 103.

[4] Cassilear *v.* Simons, 8 Paige, 273. And see Parker *v.* Browning, id., 389.

[5] Robeson *v.* Ford, 3 Edw. Ch., 441.

has been ordered by the court to deliver certain notes, held by him in trust, to the receiver previously appointed in the action, he will not be held in contempt for a refusal to deliver the notes to the plaintiff in the action, or to his attorney, when the receiver himself has not demanded the notes. In such a case, the defendant has not, in strictness, refused to comply with the order of the court, and can not, therefore, be punished for an alleged contempt in refusing to deliver the notes to the plaintiff.[1]

§ 169. As regards the power of punishing a defendant, by attachment or otherwise, for a contempt of court in refusing to obey an order to surrender his property to the receiver, the court issuing the order is the only competent judge as to the question of compliance. An attachment, therefore, for contempt in such a case should be issued or withheld, sustained, modified or set aside, only by the direct order of the court itself; and it is improper to make the issuing of such attachment dependent upon the judgment of a special commissioner, appointed by the court to take an account of the property involved.[2]

§ 170. The power of a court of equity over persons within its jurisdiction and subject to its process, to appoint a receiver of their property situated in a foreign country, is, as has elsewhere been shown, well established. And while the court may not have the means of sending its officers into the foreign country, to carry into effect its orders there, yet if a defendant within the jurisdiction of the court instructs his representatives or agents in the foreign country to resist the enforcement of the order for the receiver, he is guilty of resistance to the mandate of the court, and liable to punishment as for contempt.[3]

[1] Panton *v.* Zebley, 19 How. Pr., 394.

[2] Geisse *v.* Beall, 5 Wis., 224.

[3] Langford *v.* Langford, 5 L. J., N. S. Ch., 60. In this case the defendant being in England, and within the jurisdiction of the Court of Chancery there, a receiver was appointed over his estates in Ireland. The defendant instructed his solicitor in Ireland "to oppose, as far as the law would permit, the receivers of such rents and profits from receiving the same. The solicitor

§ 171. To render a person liable to attachment for contempt of court in interfering with the possession of a receiver, there must be an actual interference with or disturbance of the possession.[1] Where, therefore, a receiver is in the actual possession of defendant's real estate, which is subject to the lien of a judgment against the defendant, the levy upon and sale of defendant's interest in the real estate by a sheriff does not disturb the receiver's possession, and is not a contempt of court. The sheriff, in such case, merely sells the interest of the judgment debtor in the real estate, subject to all just claims of the receiver or of any other person, and does not, therefore, commit a contempt of court.[2] And a mere formal levy by the sheriff upon property constructively under the receiver's control does not constitute such a disturbance of possession as to render the sheriff liable to attachment therefor, when immediately upon making the levy he consents that the receiver may take posses-

accordingly notified defendant's tenants in Ireland that the order of the English Court of Chancery appointing a receiver was of no effect in Ireland, and that defendant would still enforce payment of his rents as before. The English receiver was thus prevented from receiving any rents. Upon motion for a sequestration against the defendant for the contempt, Lord Langdale, Master of the Rolls, held as follows: 'That this is a contempt, I have no doubt. It is true that this court has not the means of sending its officers to carry into effect its orders in Ireland; but it has jurisdiction over all persons in this country, and can compel obedience to its orders. The defendant sends to his solicitors in Ireland, to oppose by all lawful means the receiver appointed by this court from receiving the rents. If he meant by all lawful means in this country, there should be no resistance at all; because a party is not justified in opposing the order of the court; but he says by all lawful means in Ireland; that is to say, because this court can not send its process into Ireland, therefore Lord Langford's agent is to use all means in Ireland to oppose the order of the court here.' His Honor said he hoped that Lord Langford would see his error, and know that he could not resist the order of this court; and that the order for a sequestration must, therefore, be made, unless his Lordship ceased to interfere with the officer of the court."

[1] Albany City Bank *v.* Schermerhorn, 9 Paige, 372; Same *v.* Same, 10 Paige, 263.

[2] Albany City Bank *v.* Schermerhorn, 9 Paige, 372.

sion of the interest levied upon and dispose of the same, holding the proceeds subject to the order of the court by which the receiver was appointed. In such a case the possession of the court is not disturbed, since the property is placed in the same situation which it would have occupied had the receiver in the first instance reduced it to actual possession and retained it throughout.[1] And it has been held that the fact that property was in the hands of a receiver would not prevent the prosecution of an action to establish a mechanic's lien against the property.[2]

§ 172. In a proceeding for contempt instituted against a claimant of property, who has taken it from the receiver's possession without the sanction of the court, the court will not determine the question of the receiver's title or ultimate right to the property, since this can only be tried in some action appropriate for that purpose, to be instituted against the receiver. But when, in such proceedings for contempt, the claimant has taken the property out of the state, and it is impossible for the court to compel its restoration to the receiver, it is proper to order him to pay the receiver the value of the property by way of reparation.[3]

§ 173. While courts of equity will not justify any unauthorized interference with the possession of a receiver regularly appointed, yet as between two different receivers appointed over the same property in different actions, in a contest as to their right of possession, the court will hesitate to exercise its extreme powers against the second receiver by commitment for contempt in interfering with the possession of the first, when the dispute as to possession has been determined, and the only object of the application is to compel payment of costs.[4] And where, as between two receivers of the same property, appointed in different proceedings, the question of priority is determined adversely to the

[1] Albany City Bank *v.* Schermerhorn, 10 Paige, 263.

[2] Richardson *v.* Hickman, 32 Ark., 406.

[3] *In re* Day, 34 Wis., 638.

[4] Ward *v.* Swift, 6 Hare, 309; S. C., 12 Jur., 173.

receiver in possession, and he is required to surrender the property to the other, he will not be punished by attachment for disobedience to the order of court appointing the other receiver, when it is apparent that he has acted in good faith, under authority of the order appointing him, since he was entitled to regard such order as valid until the question of priority could be determined by a competent tribunal.[1]

§ 174. Since a receiver is not properly entitled to an appeal from an order of the court discharging him from his trust, not being a party in interest, but merely the officer or representative of the court, he may be compelled to turn over the property as directed by the order for his discharge, notwithstanding he has prayed an appeal to an appellate court and has filed an appeal bond. And if he refuses to comply with such order as to the disposition of the assets, obedience may be enforced by attachment. But the court will not, under such circumstances, direct an attachment to issue in the first instance, when the receiver expressly disclaims any intentional disregard of its authority.[2]

§ 174 *a*. When a corporation is dissolved and its property and assets are vested in a receiver, who is authorized by the court to continue the business, the corporation having been vested with the exclusive right to manufacture certain articles under letters patent, this right passes to the receiver by virtue of his appointment. And in such case, a former officer of the corporation who engages in the business of manufacturing the same articles, even under a license from the patentee, is guilty of such an interference with the possession and rights of the receiver, as to render him liable for contempt of court.[3]

[1] People *v.* Central City Bank, 53 Barb., 412; S. C., 35 How. Pr., 428.

[2] *In re* Rachel Colvin, 3 Md. Ch., 300.

[3] *In re* Woven Tape Skirt Co., 12 Hun, 111.

CHAPTER VII.

OF THE RECEIVER'S FUNCTIONS.

I. General Nature of His Functions.

§ 175. The office of receiver is treated as one of confidence and trust, although his discretionary powers are limited. As a rule he can do nothing to impair the fund in his hands without the order of the court, and can make no dividend without the special sanction of the court, since the funds in his possession are considered as *in custodia legis* for whoever may ultimately establish a title thereto.[1]

[1] Hooper v. Winston, 24 Ill., 353.

And a receiver has no greater rights than the guardian of a ward's estate, and is not an assignee of the person over whose estate he is appointed, being simply an officer of the court appointed to take charge of the property pending litigation.[1] And it is necessary to a proper understanding of the functions of a receiver, and of the real nature of his office, to bear in mind that he is not appointed for the benefit merely of the plaintiff on whose application the appointment is made, but for the equal benefit of all persons who may establish rights in the cause, and that he is not the plaintiff's agent, but is equally the representative of all parties in his capacity as an officer of the court.[2] If he is empowered by the court to continue the management of the business over which he is appointed, he may employ such persons as may be necessary for this purpose, and the court will not interfere with his discretion as regards such employment unless some abuse is shown.[3]

§ 176. In the management of property entrusted to their charge receivers are vested with a certain degree of discretion, for which they are responsible to the court appointing them, and in the exercise of which they are subject to its control; and if they act in good faith and without prejudice to the rights of the parties in interest, their action will be sustained by the court. For example, when receivers have advertised for proposals for leasing property under their control, they may exercise a wise discretion in accepting or rejecting bids received, and are not bound to lease the property for the highest price offered, without regard to the bidder or to the disposition he may make of the property. And the advertisement of the receivers, in such a case, does not constitute such a contract with the bidder as to compel them to take the highest bid, nor does it limit them to a certain time within which to receive bids. If, therefore, the receivers, in the exercise of their dis-

[1] King *v.* Cutts, 24 Wis., 627.
[2] Delany *v.* Mansfield, 1 Hog., 234.
[3] Taylor *v.* Sweet, 40 Mich., 736.

cretion, have awarded the lease of the premises to a particular bidder, and have acted prudently in the matter and with regard to the best interests of the trust committed to their charge, the court will not entertain the application of another bidder to compel the receivers to execute a lease to him.[1]

§ 177. The power of courts over their own receivers, including their authority to control them in the settlement of all demands against the property held by them in their capacity as receivers, is well established, and as officers of the court it is their duty to obey all orders of the court in this regard. And it is equally the duty of the court appointing a receiver to compel the settlement of claims against the property in his possession in the most expeditious manner, and so as to avoid litigation and expense to the fund in charge of the court.[2]

§ 178. A receiver has in general no discretion in the application of funds in his hands by virtue of his receivership, but holds them strictly subject to the order of the court, and to be disposed of as the court may direct.[3] He will usually be required to pay over funds in his hands to the persons who are ratably entitled thereto, rather than to invest them, when the persons entitled are already ascertained, and when there can be no difficulty in carrying out the direction of the court in this respect.[4] And when he is ordered to make any particular disposition of funds in his hands, as, for example, to return money to the person from whom he collected it, he will not be allowed to offset his own personal claims against the person to whom he is directed to return the money, since to allow this would render the disposition of the money as uncertain as before the receiv-

[1] Knott *v.* Receivers of Morris Canal & Banking Co., 3 Green Ch., 423.

[2] Guardian Savings Institution *v.* Bowling Green Savings Bank, 65 Barb., 275.

[3] Johnson *v.* Gunter, 6 Bush, 534.

[4] Collins *v.* Case, 25 Wis., 651.

er's appointment, and would thus defeat the very object of his appointment.[1]

§ 179. It frequently happens that an enlargement of a receiver's powers becomes necessary in order that he may properly discharge his trust, or because of obstructions or resistance which he may receive in attempting to perform his duties. In such cases it is the province of the court which has appointed him, upon the facts being properly presented, to enlarge his powers and to afford him the necessary protection in the performance of his duties.[2]

§ 180. Receivers are not usually permitted, at their own discretion, to apply funds in their hands in repairing or improving the premises under their control, without a previous application to the court and obtaining leave so to do.[3] If, however, a receiver has made repairs without permission, a reference may be had to a master to inquire whether they were reasonable.[4] And if, upon reference to a master, it is found that the repairs were necessary and proper, and for the lasting benefit and improvement of the estate, they may be allowed by the court.[5] And a general direction to a receiver of landed property to manage it, authorizes him to propose to the master, from time to time, to make all ordinary repairs, and a special application to the court for that purpose is unnecessary in such case.[6]

§ 181. It seems to be the established rule in England,

[1] Johnson *v.* Gunter, 6 Bush, 534. Mr. Justice Peters, for the court, says, p. 536: "If the mere agent or instrument of the court can be permitted, after receiving funds under its order, to set up claims to them wholly foreign to the object of his appointment, the position of a receiver is perverted into that of a speculator in funds, constructively at least in court, and their destiny becomes as uncertain after they enter the precincts of the court as before. The court will not thus permit itself to be made a *quasi* suitor."

[2] Ohio Turnpike Co. *v.* Howard, 1 Western Law Journal, 216.

[3] Blunt *v.* Clitherow, 6 Ves., 799; Attorney-General *v.* Vigor, 11 Ves., 563.

[4] Attorney-General *v.* Vigor, 11 Ves., 563.

[5] Blunt *v.* Clitherow, 6 Ves., 799.

[6] Thornhill *v.* Thornhill, 14 Sim., 600.

that a receiver in a cause is not allowed to originate any steps or proceedings therein of his own motion, but should leave the parties to the cause to make all applications for that purpose. The rule, however, is not without exception, and when the parties are guilty of great delay or laches in moving, the receiver is justified in himself proceeding.[1] Under the practice of the Irish Court of Chancery, it is also held that a receiver should not, of his own motion, interfere with the rights of parties to the cause by applications to the court, and that court has always manifested an extreme reluctance to granting orders upon motions made by a receiver himself, upon the ground that he should not assume to himself the management of the cause.[2] Thus, a motion made by a receiver to let certain lands under his control has been refused by that court, on the ground that such a motion should properly come from the plaintiff in the cause.[3] So it has been held that an application to the court for directions as to whether a mortgage on the lands subject to the receivership should be paid, should be made by the parties to the cause, and not by the receiver.[4] So, too, a motion by a receiver for permission to bring an ejectment against certain lands in possession of one of the defendants has been denied, on the ground that it was not the proper function of the receiver to carry on plaintiff's cause upon a question involving the relative rights of the parties.[5] In this country, however, the courts have inclined to a broader view of the proper functions of a receiver, and it is believed that his right to apply to the court for directions as to the management of the estate, or for leave to institute any necessary proceedings connected therewith, is generally recognized by the courts in most of the states.

§ 182. When custodians of a certain fund in litigation

[1] Ireland *v.* Eade, 7 Beav., 55; Parker *v.* Dunn, 8 Beav., 497.

[2] O'Connor *v.* Malone, 1 Ir. Eq., 20; Wrixon *v.* Vize, 5 Ir. Eq., 276; Comyn *v.* Smith, 1 Hog., 81. And see Callaghan *v.* Reardon, Sau. & Sc., 682; Clark *v.* Fisher, id., 684.

[3] Wrixon *v.* Vize, 5 Ir. Eq., 276.

[4] O'Connor *v.* Malone, 1 Ir. Eq., 20.

[5] Comyn *v.* Smith, 1 Hog., 81.

occupy the same relation to the fund and to the court as regularly appointed receivers, their functions or possession differing only in name, it would seem that they are to be governed as to their rights and liabilities by the same rules which govern in case of receivers. And it follows, necessarily, that since they are bound to obey the orders of the court in relation to the fund in their possession, they are entitled to the protection of the court against all loss by reason of disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in incurring.[1]

§ 183. Under the Irish chancery system, a receiver is exempt from arrest while in attendance upon the court, and when a receiver was in attendance upon a motion made against him in the course of his receivership, and was arrested for debt under a *ca. sa.*, he was discharged upon the ground that he was privileged from arrest.[2]

§ 184. The appointment of a receiver over an estate or property does not alter or affect the rights of parties as regards the operation of the statute of limitations.[3] And a payment made by a receiver to one of the parties in the cause, out of funds collected by him in his receivership, is not regarded as a payment made by the debtor, to the extent of being an acknowledgment of the indebtedness so as to take the case out of the statute of limitations, since such payment is made by the receiver in his official capacity and as an officer of the court.[4] But it has been held that the appointment of a receiver prevents the statute of limitations from running, at least in a court of equity, in favor of a stranger to the suit.[5]

§ 185. The abatement of the cause in which a receiver

[1] Adams *v.* Haskell, 6 Cal., 475.

[2] Brabazon *v.* Teynham, 2 Ir. Ch., N. S., 563.

[3] Harrison *v.* Dignan, 1 Con. & Law., 376; Kyme *v.* Dignan, 4 Ir. Eq., 562.

[4] Whitely *v.* Lowe, 2 DeG. & J., 704, affirming S. C., 25 Beav., 421.

[5] Wrixon *v.* Vize, 3 Dr. & War., 104.

was appointed does not necessarily determine his functions, and his authority is regarded as continuing until an order for his removal. And until such order he may continue to take the necessary steps to enforce the collection of rents, which it is still his duty to receive and account for.[1]

§ 186. Since a receiver is an officer of the court, and all contracts made with him are subject to ratification by the court, it has the undoubted power to vacate or modify any agreement or contract which the receiver has made, and to direct the making of another agreement; but it will not exercise such power without notice and without hearing the contracting parties.[2] And since a receiver has no power to make contracts without the authority of the court, all persons contracting with him are chargeable with knowledge of his functions in this regard and contract at their peril.[3]

§ 187. A receiver may be appointed to take charge *pendente lite* of the fund in controversy, notwithstanding a receiver has previously been appointed over the same fund in another action. But in such case the powers and functions of the second receiver are subordinate to those of the first, and he is only entitled to custody of the fund, or of so much as remains of it, after the first receiver has become *functus officio*.[4]

§ 188. A receiver being always regarded as an officer of the court, and at all times subject to its direction and orders, it is proper, in the discharge of his official duties, that he should on suitable occasions apply to the court for instruction and advice; and he is at all times entitled to such advice from the court, and should not hesitate to apply for it when questions of intricacy or difficulty occur.[5] Such

[1] Newman *v.* Mills, 1 Hog., 291.

[2] Mooney *v.* British Commercial Life Insurance Co., 9 Ab. Pr., N. S., 103.

[3] Tripp *v.* Boardman, 49 Ia., 410; Ellis *v.* Little, 27 Kan., 707.

[4] Bailey *v.* Belmont, 10 Ab. Pr., N. S., 270; Bailey *v.* O'Mahoney, 33 N. Y. Supr. Ct. R., 239.

[5] *In re* Van Allen, 37 Barb., 225; Smith *v.* New York Consolidated Stage Co., 28 How. Pr., 377; S. C., 18 Ab. Pr., 431; Curtis *v.* Leavitt, 1 Ab. Pr., 274; Lottimer *v.* Lord, 4

an application may be made *ex parte*, although it is deemed the better practice to give notice to all parties in interest in the estate or fund.[1] And since the receiver in a cause is not the representative or receiver of the person at whose instance he is appointed, he should not act under his advice or that of his counsel, but in all cases of doubt, and especially when there is a conflict of interest, he should obtain the direction of the court; and he will be allowed to and should obtain counsel for himself.[2]

§ 189. When a receiver is appointed *pendente lite*, and is authorized by the order of the court to sue for and collect such debts as are due and may become due, he may properly receive not only money which is actually due, but money not yet due, and may give a receipt and satisfaction therefor.[3] So if he is authorized by the order of the court appointing him to execute and acknowledge for record formal satisfaction of all real estate mortgages which come to his hands as receiver, upon payment or collection by him of the debts which they were given to secure, he may receive payment of and discharge a mortgage which is not yet due.[4]

§ 190. If an appeal is taken from an order appointing a receiver, and the appellate court grants a *supersedeas* and directs the receiver to undo what he has done, and to restore to its original owners the property which he had taken, his authority is thereby completely suspended and rendered nugatory by operation of law. And while the *supersedeas* does not render nugatory or unlawful any action of the receiver, had under the order of the court below before the appeal was taken, it forbids that court and its officer from further acting in the matter. The power of the court below being suspended, the power of its officer necessarily becomes

E. D. Smith, 191; Cammack *v.* Johnson, 1 Green Ch., 163; People *v.* Security Life Insurance Co., 79 N. Y., 267.

[1] Smith *v.* New York Consolidated Stage Co., 28 How. Pr., 377; S. C., 18 Ab. Pr., 431.

[2] Lottimer *v.* Lord, 4 E. D. Smith, 191.

[3] Olcott *v.* Heermans, 3 Hun, 431.

[4] Heermans *v.* Clarkson, 64 N. Y., 171.

inoperative; if, therefore, the receiver refuses to obey the mandate of the appellate court and continues to exercise the functions of his office, he is guilty of a contempt of court, and may be punished by imprisonment until he complies with the order.[1] But when by a final decree the receiver is directed to pay over the fund in his hands to the person found to be entitled thereto, he may properly make such payment before an appeal from the decree is perfected by giving a bond to operate as a *supersedeas*. And in such case, although the decree is finally reversed upon appeal, the receiver can not be again required to account for the money so paid.[2]

[1] State *v.* Johnson, 13 Fla., 33.

[2] Hovey *v.* McDonald, 109 U. S., 150.

II. Sales by Receivers.

§ 191. The functions and powers of receivers touching the sale of property committed to their charge, unless defined or regulated by statute, rest upon and are governed by the orders of the court appointing them. Good faith and fair dealing are required of receivers in the execution of such orders, and if a receiver fraudulently imposes upon and deceives the court in obtaining an order of sale, the sale may be vacated and the parties may be restored to their original position.[1] And when, acting under a misapprehension as to the value of certain assets, a receiver sells them at a grossly inadequate price, and upon learning the real facts he refuses to complete the sale and to deliver the property, the court may, in the exercise of its discretion, refuse an application by the purchaser to compel the completion of the sale. Such a contract of sale, while it remains executory, is subject to the supervision of the court, and the purchaser will be presumed to have purchased subject to the implied condition that the court may, in the exercise

[1] Hackley *v.* Draper, 60 N. Y., (N. Y. S. C.), 614, 2 Hun, 523. 88, affirming S. C., 4 Thomp. & C.

of a sound discretion, sanction or disapprove the sale, as it shall see fit.[1] And since the appointment of a receiver does not divest existing liens upon the property which is subject to the receivership, it follows that a sale by a receiver of a partnership of property mortgaged by the firm gives to the purchaser only such interest as the firm itself had in the property, and does not divest or impair the paramount mortgage lien of a stranger to the action in which the receiver was appointed.[2] So when a corporation over which a receiver is appointed has, prior to such appointment, conveyed lands to trustees to secure the holders of stock of the corporation, and thereafter, and before the receiver is appointed, the equity of redemption in such lands is also sold under execution against the corporation, and the time for redemption expires without redemption being made, the receiver takes no title to such lands, and a sale by him will convey no title.[3]

§ 192. A court of equity appointing a receiver to take possession of property, pending a litigation concerning the rights of the parties thereto, is vested with the power of selling the property in the receiver's hands, whenever such course becomes necessary to preserve the interests of all parties. Thus, in an action to determine the rights of conflicting claimants to a steamboat, which was put into the hands of a receiver *pendente lite*, and was operated under the receiver's direction for two years, the court upon being satisfied that it was highly inconvenient and unfit to continue in possession and operate the boat for a longer period, ordered it sold, although the bill on which the receiver was allowed was not framed for the purpose of effecting a sale.[4]

§ 193. A receiver is regarded as occupying a fiduciary relation, in the sense that he can not be allowed to purchase for his own benefit property connected with or forming a part of the subject-matter of his receivership, or in his pos-

[1] Attorney-General *v.* Continental Life Insurance Co., 94 N. Y., 199.

[2] Lorch *v.* Aultman, 75 Ind., 162.

[3] Fitch *v.* Wetherbee, 110 Ill., 475.

[4] Crane *v.* Ford, Hopk. Ch., 114.

session in that capacity. The courts will not permit him, any more than any other trustee, to subject himself to the temptation arising from a conflict between the interest of a purchaser and the duty of a trustee. And the rule has its foundation in grounds of public policy, and in the peculiar relation sustained by a receiver to the fund or estate in his custody, which resembles in this respect that of a solicitor, trustee, or any other fiduciary relation of a like nature where the same rule of equity prevails. Unless, therefore, it clearly appears that it would be for the benefit of the parties in interest to hold the receiver to his purchase, he will not be permitted to derive any benefit from a purchase made by himself of property pertaining to his receivership; and whatever purchase he may make will be held to be for the benefit of the real parties interested, whose interests he as receiver represents, and his purchase will be held voidable at their election.[1] And a court of equity will not ordinarily permit a receiver to become a bidder at a sale of lands of which he has had the previous management as receiver, it being regarded as of great importance to the interests of suitors, and to the faithful discharge of their duties by receivers, that they should be beyond the reach of all temptation to compromise those duties.[2]

§ 194. The general rule as above stated, denying receivers the privilege of becoming purchasers of property pertaining to their trust, is entirely independent of the question whether any fraud in fact has intervened. And a receiver of an insolvent bank, who in that capacity holds the equity of redemption of certain mortgaged premises, and who purchases the premises at a foreclosure sale under the mortgage, can not take any title or benefit of such purchase to

[1] Jewett v. Miller, 10 N. Y., 402; Carr v. Houser, 46 Ga., 477; Alven v. Bond, Flan. & K., 196; S. C., 3 Ir. Eq., 365; Eyre v. M'Donnell, 15 Ir. Ch., N. S., 534; Anderson v. Anderson, 9 Ir. Eq., 23; Titherington's Adm'r v. Hodge, 81 Ky., 286.

[2] Anderson v. Anderson, 9 Ir. Eq., 23.

himself. And the general rule applies in such a case, notwithstanding the sale is a judicial sale, under a decree against the receiver, and based upon a title paramount to his title, and to the interest of his *cestui que trust*.[1] And when a portion of the premises sold under the decree in

[1] Jewett *v.* Miller, 10 N. Y., 402. Johnson, J., observes, p. 404: "When Miller purchased the premises in question at the master's sale, December 7, 1842, he was receiver of the Wayne County Bank. The sale was made on a foreclosure of a mortgage made by one Williams, then the owner of the premises, to Minot C. Morgan and others, dated October 15, 1838, which mortgage was assigned first to the Wayne County Bank by Morgan and others, and afterward by the bank to the people of the state of New York as collateral security for moneys borrowed by the bank from the canal fund. After this last assignment, Williams sold the premises to the defendant, Cook, who gave his mortgage for the purchase money, and this mortgage was assigned by Williams to the bank as security for a debt due by him to the bank. On the 28th of August, 1841, as receiver of the Wayne County Bank, Miller procured a quitclaim deed of the premises from Cook and wife. Miller then as receiver had the right to redeem the mortgage assigned as security to the state, and also the general equity of redemption by the quitclaim from Cook and wife. Thus situated upon the foreclosure by the state, he became the purchaser of the premises. It is contended, on the part of the defendant, Miller, that his case is out of the general rule which forbids a trustee to purchase on his own account the trust property, upon the ground that the sale in this case was a judicial sale, made under a decree against the trustee, and based upon a title paramount to the title of the trustee, and to the interest of the *cestuis que trust*. That this is not the rule was adjudged in the case of Van Epps *v.* Van Epps (9 Paige, 237); Iddings *v.* Bruen (4 Sandf. Ch. R., 263). It is hardly possible to state the rule of equity too broadly or too strongly. It will not permit a trustee to subject himself to the temptation which arises out of the conflict between the interest of a purchaser and the duty of a trustee. It was Miller's duty as receiver to make the property bring the highest possible price; but as purchaser this was not his interest. The rule is entirely independent of the question whether in point of fact any fraud has intervened. It is to avoid the necessity of any such inquiry in which justice might be baulked, that the rule takes so general a form. After the purchase by Miller, it follows that his *cestuis que trust* had the right either to demand a resale of the property, or to adopt his purchase as made for their benefit, subject, of course, in the latter case, to his lien for advances. (Slade *v.* Van Vechten, 11 Paige, 21.)"

the cause have been purchased for the receiver, the sale may be set aside, even after confirmation by the court, such a case falling directly within the principle of the general rule as above stated.[1] And when a receiver had purchased at an undervaluation an annuity, which was charged upon certain lands subject to his receivership, and which it was his duty to collect, the personal representatives of the vendor were held entitled to rescind the purchase and to recover the annuity.[2]

§ 195. While, as already shown, the courts insist upon a strict observance of the rule that a receiver can not derive any advantage from the purchase of the trust property, yet upon obtaining consent of all parties interested in the lands forming the subject-matter of the litigation, a receiver has been allowed to become a tenant of the lands, when such course appeared to the court to be beneficial to the estate and to all parties in interest.[3]

[1] Alven *v.* Bond, Flan. & K., 196. The doctrine is very clearly set forth in this case by Sir Michael O'Loghlen, Master of the Rolls, in the following language, p. 211: "I do not at all agree with the counsel for the purchaser, who contend that if the court shall set aside this sale, because the purchase was made in trust for the receiver, it will introduce a new doctrine into a court of equity, and make an order which no other judge ever before ventured to make, when I find it to be the general rule of this court, founded on principles of public policy, that trustees, assignees of bankrupts, solicitors or agents for the assignees, and all persons filling any confidential office in relation to the property to be sold, shall not, without the special leave of the court, and probably the assent of all parties interested, purchase the property with which they are by their office connected; I make no new decision if I apply that principle to a receiver, and hold that the purchase made by him at a sale under a decree of this court of the property over which he is acting as receiver, made without the sanction of the court or the assent of the parties interested, but concealed from both, can not be sustained. I only apply a well established rule of the court to a case which I think fully within it, and show that this rule of a court of equity is, as Lord Cottenham, in Scarborough *v.* Borman, 4 Myl. & Cr., 379, says our legal system is, 'capable of adapting itself to the exigencies of society.'"

[2] Eyre *v.* M'Donnell, 15 Ir. Ch., N. S., 534.

[3] Stannus *v.* French, 13 Ir. Eq., 161.

§ 196. When a court of equity properly acquires jurisdiction of the parties and of the subject-matter in a cause, and appoints a receiver therein and orders him to sell the property in controversy, such order, although irregular and improvident, can not be assailed or questioned in a collateral action, and such an action will not lie to set aside the order of sale and proceedings thereunder. The appropriate method of correcting such irregularities is by motion to the court making the order, and an independent action for that purpose will not be entertained.[1] But when the receiver has procured an order of sale by a fraudulent imposition upon the court, it has been held that an action would lie to set aside the sale, even though relief might be had upon motion before the court appointing the receiver.[2]

§ 197. When a receiver applies for an order of court to authorize him to sell certain of the property in his possession, for the purpose of meeting taxes due and to become due upon other property, the evidence showing the necessity for such a sale should be clear and satisfactory to the court, and the order of sale should be specific, and should designate the particular property which the receiver is authorized to sell.[3]

§ 198. As regards the functions and powers of receivers in effecting sales of personal property entrusted to their charge, considerable latitude and discretion are allowed them as to whether the sale shall be in bulk or by parcels. And where the receiver has exercised his discretion in the matter in good faith, the court will not set aside the sale merely because it may differ from the receiver as to which, under all the circumstances, was the best method of selling.[4] But when the order for the appointment of a receiver was obtained by the plaintiff late at night, and upon an *ex parte*

[1] Libby *v.* Rosekrans, 55 Barb., 219.

[2] Hackley *v.* Draper, 60 N. Y., 88, affirming S. C., 4 Thomp. & C. (N. Y. S. C.), 614, 2 Hun, 253.

[3] Dixon *v.* Rutherford, 26 Ga., 149.

[4] National Bank of the Metropolis *v.* Sprague, 5 C. E. Green, 170.

application, and the receiver sold the property at private sale early the following morning, without notice to the defendants interested therein, the sale was set aside and the receiver's appointment revoked, the proceedings being regarded as contrary to all principles of equity, and in conflict with the due and ordinary course of procedure in courts of justice.[1]

§ 199. When a receiver is authorized and required by order of court to sell real estate, the authority to sell necessarily carries with it authority to give to the purchaser the usual evidence of a transfer of title, the power of the receiver to give the deed being necessarily implied from the order of sale. And while it may be irregular for the receiver to execute a conveyance of the real estate sold, before confirmation of the sale by the court, such conveyance is not on that account void, but only voidable, and the sale having been confirmed by the court, the objection is removed.[2] But where, by the terms of his appointment, a receiver is authorized to sell the property committed to his trust, subject to the order of the court, no transfer can properly be made or consummated by the receiver until the sale is reported to the court and confirmed, after notice to the parties who have appeared to the action. And any transfer before such confirmation is unauthorized, and any payment made is at the purchaser's risk.[3]

§ 199 *a*. A sale by a receiver, under an order of court which makes no mention of prior liens or incumbrances, operates as a transfer of title to the purchaser subject to the lien of whatever incumbrances may be outstanding; and the purchaser may contest the validity of apparent incumbrances, either with respect to their legal existence, or as to the amount due.[4] Nor is the title of a third person, not a party to the cause in which the receiver is appointed and

[1] Simmons *v.* Wood, 45 How. Pr., 268.

[2] Koontz *v.* Northern Bank, 16 Wal., 196.

[3] Simmons *v.* Wood, 45 How. Pr. 268.

[4] Hackensack Water Co. *v.* De Kay, 36 N. J. Eq., 548.

the sale made, divested or affected by such sale. And a receiver over a partnership who sells the real estate of the firm, under an order of court, sells it subject to the lien of a judgment against the individual interest of one member of the firm. And the title of a purchaser at a sheriff's sale under such judgment will prevail over that of a purchaser from the receiver.[1] So a sale of the husband's real estate, by a receiver appointed in behalf of judgment creditors, should be made subject to the dower interest of the wife, and it is improper to direct payment by the receiver to the wife of her inchoate right of dower out of the proceeds.[2]

§ 199 *b*. The doctrine of *caveat emptor* applies in cases of receivers' sales, like all other judicial sales, the purchaser being chargeable with knowledge that only the interest of the parties to the suit can be sold by the receiver, and it is for him to ascertain before purchasing what that interest is. The rule applies to the condition of the property as well as to its title; and to an action by a receiver against a purchaser for the recovery of the purchase price of real estate sold by the receiver, the defendant can not plead the defective condition of the property at the time of his purchase, in the absence of fraud or misrepresentation. And when such purchaser has acquiesced in and consented to the ratification of the sale, he can not defeat an action for the recovery of the purchase money upon the ground that another piece of real estate was included in the sale but omitted from the deed tendered to him by the receiver.[3]

[1] Foster *v.* Barnes, 81 Pa. St., 377.

[2] Lowry *v.* Smith, 9 Hun, 514.

[3] Barron *v.* Mullin, 21 Minn., 374.

CHAPTER VIII.

OF ACTIONS BY AND AGAINST RECEIVERS.

I. Principles Governing Suits by Receivers.

§ 200. One of the most important functions exercised by receivers in the discharge of their official duties is that of bringing such actions as may be necessary to the proper performance of their trust, as well as to secure and protect the assets and funds to whose control they are entitled by virtue of their appointment. In some of the states the functions of receivers, as regards the bringing of actions, are regulated to a considerable extent by statute, while in others the English practice prevails, leaving the entire subject to be regulated by the court making the appointment, in accordance with the established principles governing the jurisdiction.

§ 201. In general, a receiver, by virtue of his appointment, is clothed with only such rights of action as might have been maintained by the persons over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded.[1] It is essential, therefore, in

[1] Coope *v.* Bowles, 28 How. Pr., 10; S. C., 42 Barb., 87; Curtis *v.* McIlhenny, 5 Jones Eq., 290.

order to sustain a suit brought by him in his representative capacity, that he allege and set forth the equities of the parties whose rights of action he represents, and he must also show that by the appointment of the court, properly made in a matter within its jurisdiction, authority has been conferred upon him, in his representative capacity as receiver, to prosecute the action; and failing to show this he can not maintain an action.[1] And when an obligation has been extinguished or paid to the obligee, his receiver can not afterwards maintain an action thereon, either at law or in equity.[2]

§ 202. Courts of equity are inclined to the exercise of a strict control over their receivers in the matter of allowing them to bring suits concerning their receivership, and an action brought by a receiver is considered as brought under the order of the court itself. And a receiver will not be permitted to abuse the power entrusted to him by unauthorized suits against third persons, under pretense of authority derived from the court. If, therefore, he institutes an action in the name of a third person, without his authority and without any foundation or pretense of right, the parties to such suit are entitled to the protection of the court against such unauthorized proceedings on the part of the receiver, who will be directed to discontinue the action and will be enjoined from further proceeding therein.[3]

§ 203. It would seem that the regularity of a receiver's appointment, or the competency of the person appointed, can not be called in question in a collateral action, but must be impeached, if at all, in a direct proceeding for that purpose. It follows, therefore, that in an action instituted by a receiver in matters connected with his trust, as to obtain possession of funds belonging to him in his official capacity, if proper record evidence of the appointment is produced, it will be regarded as conclusive upon the question of the

[1] Coope *v.* Bowles, 42 Barb., 87; S. C., 28 How. Pr., 10.

[2] Curtis *v.* McIlhenny, 5 Jones Eq., 290.

[3] *In re* Merritt, 5 Paige, 125.

receiver's right. The court proceeds, in such a case, upon the ground that it is immaterial whether the appointment was proper or improper in the first instance; and that while it remains a subsisting order of court, it is not competent for any one to question it, unless by appropriate proceedings to test its validity.[1]

§ 204. The appointment of a receiver does not have the effect of changing any rights of action, or of changing the contract relations existing between the original parties, against whom the receiver is appointed, and their debtors. A receiver, therefore, can not maintain an action upon a note or obligation running to the original party, which he himself could not have maintained.[2] For example, in the case of a mutual insurance company, when the obligation of the assured upon a premium note given for a policy of insurance depends upon an assessment and notice thereof, which assessment and notice have never been given by the company, so that it could maintain no action upon the note, a receiver of the company stands in the same situation, and will not be allowed to sue without having taken the necessary steps to fix the maker's liability.[3] And a receiver can not maintain an action for the recovery of property of the defendant which had been sold under execution prior to his appointment.[4]

§ 205. For the purpose of actions and suits connected with their receivership, receivers occupy substantially the same relation which was occupied by the original parties, against whom or over whose estate they were appointed. Any defense, therefore, which a defendant might have made to an action brought by the original party is equally available, and may be made with like effect when the action is instituted by his receiver. Thus, when receivers of a bank-

[1] Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792. See, also, Attorney-General *v.* Guardian Mutual Life Insurance Co., 77 N. Y., 272.

[2] Williams *v.* Babcock, 25 Barb., 109; Bell *v.* Shibley, 33 Barb., 610.

[3] Williams *v.* Babcock, 25 Barb., 109. See, also, Thomas *v.* Whallon, 31 Barb., 172.

[4] McIlrath *v.* Snure, 22 Minn., 391.

ing corporation institute an action upon a note given for a subscription to the capital stock of the bank, and the maker relies for his defense upon the fact that the note was obtained through fraudulent representations made by agents of the bank as to the condition and value of its stock, such defense is available to the same extent and with like effect as if interposed in an action brought by the bank itself.[1] If, however, the defendant in such a case is himself culpably chargeable with participation in the fraud, having united with others in the formation of a fraudulent banking corporation, which passes into the hands of receivers for the benefit of its creditors, he can not urge such fraudulent organization in defense of an action brought against him by the receivers to enforce his subscription to the capital stock.[2]

§ 206. When receivers of a banking corporation institute an action in one state upon liabilities due to the bank, and recover judgment thereon, such judgment constitutes a good defense in bar to an action brought against the same defend-

[1] Litchfield Bank *v.* Peck, 29 Conn., 384. Sandford, J., says, p. 385: "The only question in this case is, whether the defense set up can be made available against these receivers. That it would have been entirely so, in a contest between the defendant and the bank itself, is undeniable, and is not denied; but the receivers claim that they represent creditors, and therefore stand on higher ground than the bank ever stood, and that against them this defense can not be interposed. That they represent creditors may be conceded, and that in some cases they may enforce claims which the bank itself could not enforce, need not, perhaps ought not, to be denied; but in what way and by force of what principles of law, equity or justice, receivers or creditors could avoid the application or escape the force of this defense, and compel the payment of this demand, we are unable to discover. . . Neither in law, equity or conscience was this defendant the debtor of the bank, ncr had he assumed, nor was he by the charter or the law charged with, any responsibility for its debts or obligations. These receivers are not indorsees, nor were they in fact appointed until after maturity of the note, so that the rule of policy which protects the holder of negotiable paper can have no application in their favor."

[2] Litchfield Bank *v.* Church, 29 Conn., 137. And see comments upon this case in Litchfield Bank *v.* Peck, 29 Conn., 387, 388.

ants for the same cause of action in another state, even though the former suit was brought in the name of the receivers, and the latter in the name of the bank itself. Such receivers, being empowered by the law where they were appointed to sue in the corporate name, or in their individual names, and being clothed with all the powers and rights in the collection of debts due to the bank which the corporation itself possessed, are merely its representatives for the purposes of litigation, and the judgment recovered by them in that capacity should have the same effect as if recovered in the name of the corporation.[1]

§ 207. It is important to observe, that the general doctrine of courts of equity, recognizing a receiver as the officer or representative of the court from which he derives his appointment, is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken. And after entering upon the litigation, he is regarded as being entitled to all the freedom of action of any other person, and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith or of mismanagement of his trust, and may be a meritorious rather than a censurable act.[2] A receiver, however, in all actions which he may bring by virtue of his receivership, must pursue the appropriate and existing remedies, and the authority to sue conferred upon him by the court can not convert that into an equitable right of action which was before a legal one, or change the established methods of procedure for enforcing the right.[3] If, therefore, the demand sued upon by the receiver is legal in its nature, and susceptible of enforcement in an action at law, he can not maintain a bill in equity. Thus, when by the order of his appointment the receiver of a railway company is vested with full power to "take into his possession the bills, bonds,

[1] Bank of North America *v.* Wheeler, 28 Conn., 433.

[2] Devendorf *v.* Dickinson, 21 How. Pr., 275.

[3] Freeman *v.* Winchester, 18 Miss., 577; Receiver *v.* First National Bank, 34 N. J. Eq., 450.

notes, and other evidences of debt, belonging to said company, with full power to sue for and collect all moneys due on the same," the right of action thus conferred is to be exercised in accordance with the appropriate existing remedies, and the receiver can not maintain a bill in equity, in his own name, to enforce a subscription to the capital stock of the company, since the liability of defendant is purely a legal one, to be enforced by an action at law.[1] So if the proper mode of procedure to enforce the right in question is by bill in equity, a receiver can not maintain this action by a mere petition, but must conform to the established and usual practice in this regard.[2]

§ 208. The usual practice, both in England and in America, before instituting actions by a receiver in matters connected with his trust, is to apply to the court from which he

[1] Freeman *v.* Winchester, 18 Miss., 577. This was a bill by the receiver of a railway company, in his own name, to enforce an unpaid subscription to the capital stock of the company. The court, Sharkey, C. J., say, p. 579: "The liability of the respondent on his subscription, as it originally existed, was purely legal in its character. He was liable to be sued at law by the corporation for the amount which he had subscribed, although the charter may have contained a clause providing for a forfeiture of the stock, on failure to pay. The remedy by forfeiture and sale is but cumulative. The question then is, can the complainant sue in his own name in equity, to recover a debt which, as between the original parties, was recoverable only at law? . . He is but an officer of the court, appointed to hold a fund pending litigation or infancy. But if he can sue at all it must be in the name of the party having the legal right; and authority to sue does not convert that into an equitable right which was before purely legal, or he could not bring ejectment. If he is to be regarded as an assignee, he should sue at law, of course on mere legal demands. And if he is considered as trustee, it is the same thing, for a trustee may sue at law. But does the receiver derive power to sue in this instance from the order of his appointment? It is alleged in the bill that he is authorized to sue for and collect all moneys due the company. Admitting that this order conferred the power to sue, it only gives the power to be exercised according to the appropriate remedy. The Chancellor can not convert remedies from legal to equitable. If he could confer the power to sue, he could confer it to be exercised as well at law as in equity."

[2] Receiver *v.* First National Bank, 34 N. J. Eq., 450.

derives his appointment for leave to bring such actions. And although it is frequently the case that the order of appointment in general terms authorizes the receiver to sue for and collect all demands due, yet it is a common practice, to first obtain special leave of court before beginning any action. In the English Court of Chancery, the rule was laid down in the time of Lord Thurlow, that a receiver had not, by virtue of his appointment, sufficient authority, without permission of the court, to institute an action of ejectment against tenants of the estate over which he was appointed.[1] The same rule was recognized and adopted by the New York Court of Chancery, which required the receiver to first obtain special leave of court before bringing an action of ejectment. And when a receiver was appointed over certain lands held in trust by defendant for plaintiffs, and the defendant trustee was enjoined from interfering with the trust estate, the court, on the application of the *cestui que trust*, authorized the receiver to institute actions of ejectment for the recovery of portions of the estate held by adverse claimants, when it was apparent that such course was necessary for the security and benefit of the trust.[2] The same general principle is recognized and enforced in North Carolina, where it is held that, notwithstanding the adoption of a code of procedure regulating to a certain extent the powers of courts in appointing receivers, the right of a receiver to maintain an action is to be governed by the established rules of equity, and the courts still follow the practice of the English Chancery in this regard, as settled by the authorities. A receiver, therefore, is not allowed to bring an action for the recovery of property belonging to the estate over which he has been appointed, without an order of court authorizing the proceeding.[3] So, in Georgia, it is held that a receiver has in general no authority to bring suit to recover property over which he is appointed, with-

[1] Wynn *v.* Lord Newborough, 3 Bro. C. C., 88.

[2] Green *v.* Winter, 1 Johns. Ch., 60.

[3] Battle *v.* Davis, 66 N. C., 252.

out the order of court, and that his general authority to collect and hold the assets is not sufficient to warrant him in bringing suit; since, being an officer of the court, it is for the court to say whether there shall be litigation.[1] In Maryland, however, it has been held, that when receivers are in possession of property, which is taken from them pending an appeal from the order for their appointment, the appeal bond standing in lieu of the property, on their appointment being affirmed by the appellate court, it is their immediate duty to bring an action upon the appeal bond, without any special order of court for such purpose.[2]

§ 209. Some conflict of authority exists in the reported cases upon the question whether, in the absence of statutory

[1] Screven *v.* Clark, 48 Ga., 41. This was an action by a receiver of a railway corporation to recover certain cars of the company, his only authority being the order appointing him temporary receiver of the company and of all its property, and containing these words: "And he is hereby ordered to collect immediately all said property together, and hold the same subject to the further order of the court." This was held insufficient to authorize him to bring suit, McCay, J., observing, p. 42, as follows: "The rule is perhaps an arbitrary one, but is, nevertheless, well settled, that the receiver has no right to sue without express authority from the Chancellor; his general authority to collect and keep the assets is not sufficient to justify him in bringing an action. Daniell's Chancery Practice, 1988 *et seq.* A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation. At law the party having the legal right to sue is the proper party, and if one comes suing for the property of another, he must show, as part of his right to recover, the authority he has to come into a court of law asserting another's right. We think this failure to show any authority to sue is fatal to the case of the plaintiff below."

[2] Everett *v.* The State, 28 Md., 190. The decision, however, rests upon a law of that state making it the receiver's duty to take charge of and sell the property, and collect the debts, and declaring that they should be "bound and held liable for their default, negligence or malfeasance in office." And the court say that, in such case, it is unnecessary to inquire whether, ordinarily, a receiver can bring an action without a previous order of the court from which he derives his appointment. See as to the doctrine in Louisiana, Helme *v.* Littlejohn, 12 La. An., 298.

authority, a receiver may institute and conduct actions in his own name, in matters concerning his receivership, or whether he must sue in the name of the original party in whose favor the action accrued. It is believed, however, that the weight of authority clearly supports the proposition, that the receiver must sue in the name of the person having the legal right, and that where neither the laws of the state nor the order of his appointment authorize him to proceed in his own name, he can only proceed in the name of the person in whom the right of action existed before the receiver's appointment.[1] Thus, the receiver of a corporation can not, by virtue of his appointment, prosecute suits for the enforcement of choses in action and debts originally due to the corporation, in his own name, but must proceed in the name of the corporation, in whose favor the legal right accrued.[2] And the rule applies, even though the order of his appointment authorizes the receiver to collect such choses in action as may come to his hands, for which purpose he is authorized to prosecute suits in the courts of the state, and he must still proceed in the name of the corporation, and can not sue in his own name.[3] So in the case of a receiver over a partnership, it is held that he can not maintain an action of trover, in his own name, for the conversion of property before his appointment, but that suit must be brought in the name of the firm in whom the right of action originally existed. The receiver's appointment, it is held, does not transfer to him the legal rights of the firm in any of

[1] Yeager *v.* Wallace, 44 Pa. St., 294; Justice *v.* Kirlin, 17 Ind., 588; Manlove *v.* Burger, 38 Ind., 211; King *v.* Cutts, 24 Wis., 627; Freeman *v.* Winchester, 18 Miss., 577; Battle *v.* Davis, 66 N. C., 252; Garver *v.* Kent, 70 Ind., 428; Moriarty *v.* Kent, 71 Ind., 601; Harrell *v.* Kent, 71 Ind., 602. See, also, Ingersoll *v.* Cooper, 5 Blackf., 426. But see, *contra*, Wray *v.* Jamison, 10 Humph., 186; Helme *v.* Littlejohn, 12 La. An., 298; Baker *v.* Cooper, 57 Me., 388. And see Iglehart *v.* Bierce, 36 Ill., 133.

[2] Battle *v.* Davis, 66 N. C., 252; Justice *v.* Kirlin, 18 Ind., 588; Freeman *v.* Winchester, 18 Miss., 577; Garver *v.* Kent, 70 Ind., 428; Moriarty *v.* Kent, 71 Ind., 601; Harrell *v.* Kent, 71 Ind., 602.

[3] Battle *v.* Davis, 66 N. C., 252.

their choses in action, and trover can only be maintained by one who has the legal right.[1] And where, pending litiga-

[1] Yeager *v.* Wallace, 44 Pa. St., 294. But see Helme *v.* Littlejohn, 12 La. An., 298. Yeager *v.* Wallace was an action of trover by a receiver of a partnership to recover for the alleged conversion of firm property before the receiver's appointment. Judgment for plaintiff, which was reversed on appeal, the court, Strong, J., holding as follows, p. 295: "But can a receiver of the property of a partnership maintain an action of trover in his own name for the conversion of the personal property of a firm by a wrong-doer before the appointment of a receiver was made? He is but an officer of the court which appoints him, and does not become the legal owner of the property which he is required to take in charge. The appointment of a receiver does not transfer to him the legal rights of the partnership in any of their choses in possession or in action. Trover can only be maintained by him who has the legal right. How, then, can the receiver sue, except in the name of the firm? That he can not, not only seems manifest upon principle, but is established by authority. Thus, in Taylor *v.* Allen, 2 Atk., 213, Lord Chancellor Hardwicke appointed a receiver to collect the assets of a testator, and empowered him to bring actions in the name of the executrix. In Pitt *v.* Snowden, 3 Atk., 750, the same Chancellor said, a receiver must distrain in the name of him who has the legal right. This, however, can not apply to a case where the tenant has attorned to the receiver, for by the attornment the legal right becomes vested in the receiver, and he may then distrain in his own name. Daniell's Chan. Prac., 1977. Indeed I do not find it has ever been decided that a receiver can sue in his own name for any debt, claim, or demand of a party of whose effects he has been appointed receiver, or to recover the possession or control of any real estate or choses in action of such party, unless some statute has enabled him. He has always been regarded, not as having the legal right, but as a mere custodian to take charge of the property during a pending litigation. If possession be withheld from him by the party whose property has been taken charge of by the court, delivery to the receiver is enforced by attachment. If a third person, not a party to the proceedings in equity, withhold the property, suit may be brought by the receiver with the consent of the court, but he must bring it in the name of him who has the legal right. In New York, it is true, a receiver is more than a custodian. He is a statutory assignee. But this is in consequence of the statute of that state of April 28, 1845, Laws, 90, 91, and of the code of 1849. The act of 1845 empowered receivers to sue in their own name for any debt, claim, or demand transferred to them, or to the possession or control of which they are entitled as receivers. In Wilson *v.* Wilson, 1 Barb. Chan. Rep., 594, the Chancellor thought the act

tion concerning certain real estate, a receiver is appointed to take charge of and lease the premises *pendente lite*, his powers are to be regarded as identical with those of a receiver in chancery generally. He is not an assignee of the owner, and can not, therefore, maintain an action of forcible entry and detainer in his own name, to remove a lessee holding possession under a lease executed prior to the receivership, and it would seem to be the proper course for him to apply for leave to prosecute the action in the name of the lessor.[1] So a trustee in the nature of a receiver, appointed by the court to receive and collect certain notes, is not authorized by virtue of his appointment to sue in his own name on notes not made to or assigned to himself, but must bring his action in the name of the person in whom is the legal title.[2]

§ 210. Notwithstanding the decided weight of authority is in support of the rule laid down in the preceding section, a contrary doctrine has been strongly maintained in some

not broad enough to transfer the title of real estate to the receiver by the mere order of the court, and without an actual conveyance from the party to the suit in whom such legal title was vested. But the code put real and personal estate on the same footing. Porter *v.* Williams & Clark, 5 Seld., 142. Without the statutes of New York, it was never ruled in that state that a receiver had the legal title even to personalty. The right to sue in his own name was always rested upon the act of 1845, or upon the code, or upon an act passed in 1825, not upon any rule or course of practice in chancery. See 1 Johns. Chan. Cases. In Wilson *v.* Allen, 6 Barb., 545, it is said that at law an ordinary receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name, for any debt or demand transferred to him (under the order of his appointment), or to the possession or control of which he was entitled, under an order of the court, until the act of 1845. There is no act of the assembly in this state that gives to a receiver of a court of equity anything more than an equitable interest in the property or rights in action committed to his charge, or which invests him with the legal ownership. It seems, therefore, to follow that he can not sue in his own name, and that the present suit, being in the name of the receiver, was erroneously brought. The judgment is reversed, and a writ of restitution is awarded."

[1] King *v.* Cutts, 24 Wis., 627.

[2] Ingersoll *v.* Cooper, 5 Blackf., 426.

of the states, which have recognized and upheld the receiver's right to institute actions in his own name, by virtue of his appointment and the general powers thereby conferred.[1] Thus, in Tennessee, it is held that the necessary effect of the delivery of a demand or chose in action to a receiver, duly appointed by a court of equity, is to invest him in his capacity as receiver with such an interest in the debt to be recovered that he alone is entitled to sue therefor, and in his own name, the right of action being divested from the original parties of whose estate he has been appointed receiver. And the addition to his name of words indicating his capacity as receiver is regarded as a mere *descriptio personæ*.[2] So in Louisiana, it is held that a receiver of partnership assets, appointed pending litigation for the settlement of the firm business, is authorized by virtue of his appointment to institute an action in his own name for the recovery of money due to the firm, and that a judgment in his favor in such action is a sufficient protection to the defendant therein.[3] So, too, it is held in Maine, that receivers of a bank may maintain in their own name an action of forcible entry and detainer, to obtain possession of real estate to which the bank is entitled. Their right of action in their own name, under such circumstances, is based upon the fact that the right to possession, if obtained in the name of the bank, would require the officer executing the writ to put the bank and not the receivers in possession, while the very purpose of the proceeding is to enable the receivers to obtain possession.[4] But it is held in the same state, that the appointment of receivers to wind up the affairs of a bank does not prevent the bank from maintaining an action in its own name, at the instance of the receivers, to recover upon a liability due to the bank

[1] See Wray *v.* Jamison, 10 Humph., 186; Helme *v.* Littlejohn, 12 La. An., 298; Baker *v.* Cooper, 57 Me., 388.

[2] Wray *v.* Jamison, 10 Humph., 186.

[3] Helme *v.* Littlejohn, 12 La. An., 298.

[4] Baker *v.* Cooper, 57 Me., 388.

from an indorser of a promissory note.[1] It is held in Pennsylvania, that when property has come into a receiver's hands by virtue of his appointment, and he has sold it under order of the court, he may maintain an action of *assumpsit* in his own name to recover the purchase price.[2] And in Georgia, it is held that a court of equity in appointing a receiver has power to authorize him to bring suits concerning the subject-matter of his receivership, and that when so authorized he may sue in his own name.[3] In Illinois, it is held that in an action brought by receivers of the assets of a banking corporation, to recover money due to the estate, as in the foreclosure of a mortgage, the bank itself need not be made a party to the suit; since its property having passed into the hands of receivers, the *prima facie* intendment is that the bank has no such interest in the subject-matter as to render it a necessary party, its only right being to call upon the receivers for an accounting.[4]

§ 211. The question discussed in the preceding sections, as to the receiver's right to sue in his own name, is sometimes determined by the statutes of the state under which he is appointed. And where a statute provides for appointing receivers to wind up the affairs of insolvent corporations, and authorizes such receivers to sue in the name of the corporation or otherwise, a receiver appointed under the statute may properly bring suit in his own name to recover upon notes due to the corporation.[5] And where, under the laws of the state, a receiver of an insolvent corporation is

1 American Bank *v.* Cooper, 54 Me., 438.

2 Singerly *v.* Fox, 75 Pa. St., 112.

3 Hardwick *v.* Hook, 8 Ga., 354.

4 Iglehart *v.* Bierce, 36 Ill., 133.

5 Manlove *v.* Burger, 38 Ind., 211; Hayes *v.* Brotzman, 46 Md., 519. See, also, Frank *v.* Morrison, 58 Md., 423. And under the statutes of Connecticut, a receiver over a corporation may bring suit in his own name to recover for the conversion of property of the corporation. Terry *v.* Bamberger, 44 Conn., 558. And in the same state, a receiver over a foreign corporation, appointed in another state, may sue in his own name to recover money due him for the completion of contracts made originally with the corporation over which he is appointed. Cooke *v.* Town of Orange, 48 Conn., 401.

vested with the legal title to all the property of the corporation, with full authority to sue in his own name for the recovery of debts due to the corporation, if an indebtedness due to the company has been released and discharged in fraud of the rights of innocent shareholders, an action to recover such indebtedness is properly brought in the name of the receiver.[1] So where the laws of the state governing the appointment of receivers of corporations provide that such receivers shall have full power to sue for and to collect any demands, or to recover any property, in the name of the corporation for the use of its creditors, in the same way and to the same extent that the corporation itself might recover, the corporation can not prosecute an action in its own name, the right of action being vested in the receivers by virtue of the statute. Otherwise, actions might be prosecuted in the name of a dissolved corporation, by unauthorized persons, without right and in violation of the rights of debtors, creditors and shareholders.[2]

§ 212. When the receiver's authority is derived, not merely from the order appointing him, but from a statute under which the appointment was made, his functions as regards the bringing of suits, in matters concerning his receivership, must be determined with reference to the extent of the powers conferred by the statute. And where a statute providing for the appointment of receivers of insolvent corporations, authorizes the receiver to sue in his own name, or otherwise, and to recover all the estate, debts and things in action belonging or due to the corporation, the term "chose in action" will be construed as extending to all rights to personal property not in possession, which may be enforced by action, whether growing out of contract or tort. The receiver of a banking corporation, appointed under such statute, may, therefore, maintain an action of trover for the conversion of personal property of the bank, such as bonds,

[1] Nathan *v.* Whitlock, 9 Paige Ch., 152.

[2] Miami Exporting Co. *v.* Gano, 13 Ohio, 269. See, also, Renick *v.* Bank of West Union, 13 Ohio, 298.

even though the alleged conversion occurred before his appointment.[1] So when the court appointing a receiver over an insolvent insurance company is empowered by statute to make such orders and decrees as may be necessary for winding up the affairs of the company, under the general authority thus conferred the court may authorize the receiver to sue in his own name to recover unpaid subscriptions to the capital stock of the company,[2] or to recover money wrongfully misappropriated and wasted by the officers of the company.[3]

§ 213. In New York, where the laws of the state authorize receivers to bring actions in their own name concerning matters pertaining to their receivership, when an action is instituted by a receiver for the recovery of money due to the estate over which he is appointed, and the receiver is afterwards removed and another is appointed in his stead, it is proper to substitute the successor as plaintiff in the action. And in such case, the death of the first receiver, after the substitution, does not affect or abate the right of action in the successor.[4] So where an action is instituted by a banking corporation in the name of its president, and a receiver is subsequently appointed, who is invested with all the rights of the corporation and of the plaintiff, as its president, in the subject-matter of the action already begun, the receiver must be made a party to such suit before the court will allow it to proceed, and no order affecting his right to be substituted as plaintiff, and to continue the suit, will be made without notice to him.[5] And when, after instituting an action concerning his receivership, the receiver dies and a successor is appointed, who succeeds to all the rights and duties of the former, the action must be continued in the name of the new receiver. And the

[1] Gillet *v.* Fairchild, 4 Denio, 80.

[2] Gill *v.* Balis, 72 Mo., 424.

[3] Alexander *v.* Relfe, 74 Mo., 495. See as to the power of receivers to sue in their own names under the statutes of Missouri, State *v.* Fichteukamm, 68 Mo., 289.

[4] Sheldon *v.* Adams, 27 How. Pr., 179; S. C., 41 Barb., 54.

[5] Talmage *v.* Pell, 9 Paige, 410.

proper method of thus continuing the action and bringing the new receiver into the case, under the New York practice, is said to be by proceedings in the nature of a bill of revivor, or a supplemental bill.[1] So in Georgia, it is held that an action brought by a receiver does not abate by reason of his death, but that it may be continued in the name of his successor, when the cause of action is one which survives. But the appropriate practice in that state, in substituting the successor as plaintiff in the action, is said to be by *sci. fa.* to the defendant.[2]

§ 214. When a receiver is appointed of the effects and estate of the plaintiff in an action, and moves to be substituted in lieu of the original plaintiff and to continue the action in his own name as receiver, it is competent for the court, in granting the motion, to impose such conditions as may be necessary to promote the ends of justice. For example, when an action is brought upon a note, the defense being a failure or want of consideration, and by the fault or negligence of the parties representing the plaintiff, the action has been permitted to slumber for a period of years sufficient to have barred a recovery upon the note, and a receiver of the original plaintiff, seven years after plaintiff's death, moves to be substituted in his stead and to continue the action, the court may properly impose upon him, as a condition of granting his motion, that he assume the burden of proving the consideration of the note.[3] So when a corporation institutes an action for the foreclosure of a mortgage, and a receiver is afterward appointed over the corporation in another state, in which it was incorporated, it is proper to substitute the receiver as complainant in the foreclosure suit, upon such terms as may be appropriate for the protection of any citizens of that state who may be creditors of the company, and for securing obedience to the orders of the court with respect to the fund which may be

[1] Palmer *v.* Murray, 18 How. Pr., 545.

[2] Searcy *v.* Stubbs, 12 Ga., 437.

[3] Livingston *v.* Olyphant, 2 Rob. (N. Y.), 639.

realized by the suit.[1] And the appointment of a receiver over a corporation does not afford ground for the continuance of an action previously brought against the corporation.[2] Nor is it error for the court in which an action is pending against a corporation at the time of appointing a receiver of its affairs to refuse, upon application of the corporation defendant, to join the receiver as defendant, and if he desires to defend he should himself make the application.[3]

§ 215. A mortgage of real estate, executed to receivers of a banking corporation to secure an indebtedness due from the mortgagor to the bank, may be foreclosed by successors of the original receivers, in their own name, in a state other than that in which they were appointed. And in such foreclosure proceedings, the bank itself need not be joined as a party, it being presumed to have no property or interest in jeopardy, and the proceedings being in reality for the benefit of its creditors.[4]

§ 216. The employment of counsel by receivers is regarded as an appropriate means to attain the end sought by the litigation. The general rule, however, subject to the limitations to be hereafter noticed, is that the receiver should not employ the counsel of either of the parties to the litigation in which he was appointed; since their duty being to protect the interests of their respective clients and to watch the receiver's proceedings, to the end that a faithful performance of his duties may be insured, they are not regarded as competent to act as counsel for the receiver, and their undertaking to act in such a capacity might frequently cast upon them inconsistent and conflicting duties, which could not be properly discharged by one and the same person.[5] It is also regarded as improper, when a re-

[1] National Trust Co. *v.* Murphy, 30 N. J. Eq., 408.

[2] Toledo, W. & W. R. Co. *v.* Beggs, 85 Ill., 80.

[3] Mercantile Insurance Co. *v.* Jaynes, 87 Ill., 199.

[4] Iglehart *v.* Bierce, 36 Ill., 133.

[5] Ryckman *v.* Parkins, 5 Paige, 543; *In re* Ainsley, 1 Edw. Ch., 576; Ray *v.* Macomb, 2 Edw. Ch., 165; Adams *v.* Woods, 8 Cal., 306; Moore *v.* O'Loghlin, 3 L. R. Ir., 405. See, also, Blair *v.* St. L., H. & K. R. Co., 20 Fed. Rep., 348.

ceiver seeks leave of court to bring an action in relation to personal property pertaining to his receivership, to employ the counsel of the persons holding the property, or interested therein, which is the subject-matter of the controversy.[1] And when counsel for the plaintiff, in a proceeding for the dissolution of a partnership, have also acted as associate counsel for the receiver, the court has refused to allow a claim for compensation in their behalf.[2]

§ 217. It is to be observed, however, that the rule, as above stated, prohibiting a receiver from employing the counsel of either party in the cause, is limited in its application to cases where the receiver is acting adversely to one of the parties to the litigation, since it is only in such cases that there can be any impropriety in the employment of such counsel by the receiver.[3] And the rule is intended only for the protection of the rights of the parties themselves, and can not be invoked by a stranger to the original action in which the receiver was appointed. Where, therefore, no objection is urged by such parties, the receiver may employ the counsel of either of them to aid him in the discharge of his trust; and a mere stranger to the original action will not be heard to object that the receiver has employed such counsel to institute an action against him.[4] And when a receiver is appointed in a creditors suit brought to set aside fraudulent transfers of his property by the judgment debtor, it is regarded as especially appropriate that the receiver should employ the counsel for the creditors, who is familiar with the litigation resulting in the receivership.[5]

§ 218. A receiver, duly appointed by a court of competent jurisdiction, may maintain an action of detinue for property which has been in his possession as receiver; for

[1] *In re* Ainsley, 1 Edw. Ch., 576.

[2] Adams *v.* Woods, 8 Cal., 306.

[3] Smith *v.* New York Consolidated Stage Co., 28 How. Pr., 377; S. C., 18 Ab. Pr., 431.

[4] Warren *v.* Sprague, 11 Paige, 200, affirming S. C., 4 Edw. Ch., 416.

[5] Shainwald *v.* Lewis, 8 Fed. Rep., 878.

while he can not maintain the action upon the ground of right of property in himself merely by virtue of his appointment, he is yet entitled to its possession, and the right of possession is sufficient foundation for the action.[1]

§ 219. Where a receiver has brought an action and recovered judgment therein, for the benefit of the plaintiff in the action in which he was appointed, such proceedings constitute a bar to a subsequent suit brought by such plaintiff for the same cause of action. Under such circumstances, the receiver is regarded as the representative of the plaintiff, just as an executor or administrator represents the interests of the estate of a deceased person. And to permit one at whose solicitation the receiver was appointed to prosecute a demand for which judgment has already been obtained for his benefit by the receiver, would be to multiply unnecessary litigation.[2]

§ 220. To warrant a receiver in bringing an action at law, he must either have in himself the legal title to the matter or thing in controversy, or must bring the action in the name of the person having such legal title. When, therefore, an action is brought by an administrator to recover upon a promissory note due to the deceased, and the proceedings are subsequently amended by changing the character of the plaintiff from that of administrator to that of receiver, such an amendment is an abandonment of the capacity in which he originally sued, and virtually destroys the action.[3]

§ 221. In Wisconsin, a distinction is drawn between actions brought by a receiver to remove obstructions to title and determine adverse claims, or to obtain a transfer or conveyance of title to the receiver, and actions brought by him to recover for injuries to real estate, or for the recovery of its possession. The former class of actions are regarded as founded upon the theory that the receiver has not obtained

[1] Boyle *v.* Townes, 9 Leigh, 158.

[2] Tinkham *v.* Borst, 24 How. Pr., 392.

[3] Newell *v.* Fisher, 24 Miss., 246.

title to the realty, while the latter are based upon the assumption of title in himself. And a receiver in that state, appointed in proceedings supplementary to execution under the code of procedure, to take charge of the estate of a defendant in a divorce suit, against whom a decree for alimony has been rendered, may maintain the former class of actions; he may, therefore, bring an action to set aside a fraudulent conveyance of defendant's real estate, made by him with a view to defeat the decree for alimony.[1]

§ 222. Upon the question of what rights of action pass to a receiver by virtue of his appointment, it has been held in New York, under a statute conferring a right of action upon a borrower to recover back money which he has paid by way of usury, that this right of action passes to his receiver, who may maintain a suit for the recovery of the usurious payments. But since the right of action in such a case is wholly dependent upon statute, it can only be sustained if brought within the time prescribed by the statute.[2]

§ 223. To entitle a receiver to sue for and recover rents accruing from property of a defendant debtor over whose estate he is appointed, he must give notice of his appointment to the tenant, and without such notice he can not maintain an action. The object of the notice is twofold: first, to protect the estate from payment to the wrong person; and secondly, to prevent the tenant from dealing with the former owner in ignorance of the appointment of a receiver.[3] But when one has made a deed of real estate, absolute upon its face, but intended in the nature of a mortgage as security for a loan, and the grantee sells the premises conveyed, a receiver of the grantor may maintain an

[1] Barker *v.* Dayton, 28 Wis., 367. And see, as to the right of action of a receiver under the New York code of procedure, to set aside a fraudulent conveyance of defendant's property, where no assignment has been made by defendant to the receiver, Foster *v.* Townshend, 12 Ab. Pr., N. S., 469.

[2] Palen *v.* Johnson, 46 Barb., 21. And see Palen *v.* Bushnell, 46 Barb., 24.

[3] Hunt *v.* Wolfe, 2 Daly, 298.

action against the grantee for the balance of the purchase money due, after satisfying the amount loaned.[1]

§ 224. When several persons enter into a subscription to contribute certain sums to a common object, and on proceedings in equity by some of the subscribers a receiver is appointed to take possession of the funds and assets realized by the subscription, it would seem that the receiver has the same right of action to enforce an unpaid subscription that the other subscribers would have had.[2] Nor does it constitute any objection to such suit by the receiver that he represents all parties to the subscription, including the defendant, whose subscription he is seeking to enforce by action.[3]

§ 225. In an action brought by the receiver of a corporation against a debtor to the corporation, when judgment was obtained on failure to answer, and defendant moved to set aside the judgment to enable him to set up in defense the illegality of plaintiff's appointment as receiver, it was held that, as plaintiff was acting under an order of court, which was acquiesced in by the corporation over whose assets he was appointed receiver, the defendant could not object to irregularities in the appointment, if enough appeared in the original proceedings to give the court jurisdiction.[4]

§ 226. When a receiver is authorized and directed, by the terms of the order or decree appointing him, to collect, and, if necessary, to sue for the hire of certain property, his right of action will be held to relate back to the beginning of his principal's title; and being substituted in place of the owners of the property, he is subrogated to all their rights.[5]

§ 227. It has been held that the failure of a receiver to execute a bond with sureties, as required by the order ap-

[1] Van Dusen *v.* Worrell, 4 Ab. Ct. Ap. Dec., 473.

[2] Lathrop *v.* Knapp, 27 Wis., 214, opinion of Dixon, C. J.; S. C., 37 Wis., 307.

[3] Lathrop *v.* Knapp, 37 Wis., 307.

[4] Jay *v.* De Groot, 17 Ab. Pr., 36, note.

[5] Hardwick *v.* Hook, 8 Ga., 354.

pointing him, was sufficient ground for a nonsuit in an action instituted by the receiver in his official capacity, since no title could vest in him until he had complied with the order requiring the bond.[1] But a mere informality in a bond executed by a receiver appointed in a creditor's suit, can not be taken advantage of by the defendant in an action brought by such receiver, and only the judgment debtor can take advantage of such irregularity.[2]

§ 228. Where a statute of the state authorizes judgment against a sheriff for money collected by him in his official capacity, such judgment to be entered upon motion in behalf of the person entitled to the fund collected, a receiver of such person, being entitled to receive the fund in behalf of the original parties, may properly move for judgment against the sheriff.[3]

§ 229. As regards the liability of a receiver for costs in actions instituted by him concerning his receivership, he stands in much the same relation as an executor or administrator prosecuting in behalf of an estate, and is entitled to the same consideration, being an officer of the court. And when he has acted in good faith, he should not be held liable for costs for not proceeding to the trial of a cause which he has noticed for trial, but which he has been prevented from trying by sufficient reasons, such as the absence of a material and necessary witness.[4]

§ 230. Since a receiver represents all parties in the action, whether plaintiffs, defendants or creditors, and may take possession of, and exercise control over, all matters connected with his receivership, he may, in an action instituted by him in his official capacity, garnish the plaintiff in the suit in which he was appointed.[5]

[1] Johnson *v.* Martin, 1 Thomp. & C. (N. Y. Supreme Court), 504.

[2] Morgan *v.* Potter, 17 Hun, 403.

[3] Goss *v.* Southall, 23 Grat., 825.

[4] St. John *v.* Denison, 9 How. Pr., 343. See further as to costs against receivers, Hubbell *v.* Dana, 9 How. Pr., 424. And see as to requiring receivers to give security for costs under the New York code of procedure, Kimberly *v.* Stewart, 22 How. Pr., 281; Kimberly *v.* Goodrich, 22 How. Pr., 424; Kimberly *v.* Blackford, 22 How. Pr., 443.

[5] McDonald *v.* Carney, 8 Kan., 20.

II. Pleadings and Proofs in Actions by Receivers.

§ 231. Upon the question of the extent to which a receiver, in an action brought by him in his official capacity, should set forth in his pleadings the authority under which he acts and the proceedings of the court in the original suit from which he derives his appointment, the authorities are not altogether harmonious or reconcilable. The general principle, however, may be regarded as uncontroverted, that a receiver, like any other person bringing suit under special authority, must duly allege and set forth his authority in the pleadings, and this must be alleged in a traversable form, so that issue may be taken thereon; in which event it must be proven upon the trial, in like manner as any other traversable fact.[1] Or, stated in other words, the rule is that sufficient facts should be alleged to show that the appointment has actually been made, and these facts should be alleged in issuable form.[2]

§ 232. But in attempting to determine how far the receiver's pleadings must set forth the original proceedings or appointment, so as to render them issuable, a want of harmony becomes apparent in the decided cases. Under the

[1] Bangs *v.* McIntosh, 23 Barb., 591. And see Stewart *v.* Beebe, 28 Barb., 34.

[2] White *v.* Low, 7 Barb., 204. See, as to sufficiency of allegations of the receiver's appointment, under the New York code of procedure, and as to the method of taking advantage of their insufficiency, Cheney *v.* Fisk, 22 How. Pr., 236.

earlier decisions of the New York courts bearing upon this question, a somewhat stringent rule was adopted. And it was held that the receiver must set forth the time and mode of his appointment,[1] as well as the place,[2] in order that defendant might be enabled to take issue upon those points. Thus, when the receiver of a banking corporation, deriving his appointment and authority under a statute conferring upon him rights of action in his own name for the recovery of demands due the corporation, brought an action of trover to recover certain bonds, the property of the bank, it was held insufficient that he should allege in his declaration, merely in general terms, that he was duly appointed receiver of the bank, since such an averment was not issuable or triable; and that he should set forth the particulars of his appointment, in order that the court might determine whether he was duly appointed.[3]

§ 233. The later decisions in New York, however, have very greatly relaxed the stringency of the former rule; and it is now held that in actions by a receiver to recover upon obligations due to a defendant debtor, over whose estate the receiver has been appointed, an averment of his appointment in general terms, as that he was at such a time duly appointed receiver, is sufficient to sustain the action; and under such an averment the receiver may, upon the trial, show all the necessary facts conferring jurisdiction.[4] And it is held unnecessary to set forth all the proceedings showing the appointment, it being sufficient if enough is alleged to enable defendant to take issue.[5]

[1] Dayton *v.* Connah, 18 How. Pr., 326.

[2] White *v.* Low, 7 Barb., 204.

[3] Gillet *v.* Fairchild, 4 Denio, 80.

[4] Rockwell *v.* Merwin, 45 N. Y., 166, affirming S. C., 1 Sweeney, 484, 8 Ab. Pr., N. S., 330. See, also, Manley *v.* Rassiga, 13 Hun, 288.

[5] Stewart *v.* Beebe, 28 Barb., 34. This was an action by the receiver of the Bowery Bank, to recover upon a note due to the bank. The complaint alleged that "by an order of the supreme court of the state of New York, made at the city hall of the city of New York on the 5th day of November, 1857, the plaintiff was duly appointed receiver of the Bowery Bank, of the

§ 234. Where, however, a receiver of a judgment debtor, appointed on proceedings supplementary to execution by judgment creditors, under the New York code, institutes an action to set aside an assignment of his property made by the debtor, it would seem to be necessary that the receiver should state the equities of the creditors whom he represents; since he is only clothed with such rights of action, for the purpose of setting aside such an assignment, as might have been maintained by the creditors themselves. It has accordingly been held insufficient, in such a case, for the receiver to allege merely that he was appointed receiver in the creditors' suit, but the judgment and other facts necessary to maintain that action should be set forth.[1]

§ 235. While the cases already cited sufficiently indicate that the receiver must set forth, at least in general terms, the authority by virtue of which he institutes the action, it may happen that the defendant is estopped by his own conduct or admissions from denying the right of the receiver to sue in that capacity. Thus, when in an action brought by a receiver, defendant demurs and his demurrer is overruled, and he then obtains leave to plead to the merits, upon condition of his executing a bond with sufficient sureties, conditioned to abide the result of the action, the execution of such bond will be regarded as an admission by the obligors, not only that the plaintiff was duly appointed receiver, but that he was authorized to bring the action mentioned in the condition of the bond. And when, in such case, the receiver obtains judgment in the original action, and then brings suit upon the bond, it is not necessary for him to

city of New York, upon filing certain security therein mentioned; which said security was duly filed on the 6th day of November, 1857; and that the plaintiff thereupon entered upon the duties of his appointment, and is now in the lawful possession of the property and effects of the bank as receiver thereof." Held, upon demurrer, that this was a sufficient allegation of plaintiff's appointment and title.

[1] Coope *v.* Bowles, 28 How. Pr., 10; S. C., 42 Barb., 87.

prove either his appointment, or his authority to bring the action.[1]

§ 236. In Indiana, it is held, when an action is brought by the receiver of an insolvent insurance company to recover an assessment upon premium notes due to the company, that it is not necessary for the receiver to present with his pleadings a transcript of the decree against the insurance company, under which he derives his appointment, and by which the assessment was made upon the premium notes, since the evidence of his right of action, although essential to a recovery, is not the foundation of the action, and rests only in averment.[2] And in an action brought by the receiver of a partnership to recover an indebtedness due to the firm, the omission of any averment as to when or by what court he was appointed will be cured by verdict.[3]

§ 237. In an action brought by the receiver of a national bank, appointed by the comptroller of the currency under the national banking act of June 3, 1863, it is held that the fact of the receiver's appointment, alleged in general terms, is all that is in strictness necessary to sustain the action. That the emergency had arisen, and that the adjudication establishing it, which the law requires to precede and justify the appointment, had been made, need not be alleged or proven as between the receiver and a debtor of the bank, any further than the proof afforded by the appointment itself, followed by the acquisition of the assets.[4]

[1] Scott *v.* Duncombe, 49 Barb., 73.

[2] Boland *v.* Whitman, 33 Ind., 64.

[3] Griesel *v.* Schmal, 55 Ind., 475.

[4] Platt *v.* Crawford, 8 Ab. Pr., N. S., 297. In this case, the receiver set forth in his complaint the corporate existence of the bank under the act of congress, with the following averment of his appointment: "That on said September 5, 1867, Hiland R. Hulburd was the comptroller of the currency of the United States; and that on said September 5, 1867, this plaintiff was duly appointed a receiver of said bank by said Hiland R. Hulburd, comptroller of the currency, in accordance with the provisions of said act of congress, and the amendments thereof, by and with the concurrence of the secretary of the treasury; that in accordance with the said provisions of said acts, the plaintiff thereupon took possession

§ 238. Upon the question of the degree of proof as to his appointment, which is required of a receiver, upon the trial of an action brought by him in his official capacity, it has been held, when the only proof produced at the trial was a copy of the order of appointment, and the giving of a bond in conformity therewith, that the pendency of the original action in which the appointment was made might be sufficiently proven by the recitals of the order, when the court making the appointment was a court of general jurisdiction, the presumption being entertained that all things were done which were required by law to authorize the order.[1] And it has been held to be unnecessary for the receiver to produce upon the trial a transcript of all the proceedings in the suit in which he was appointed, and that a certified copy of the entry or order of appointment was sufficient *prima facie* evidence that the court had the proper parties before it when the order was made, leaving defendant to rebut this presumption if possible.[2]

of the books, records and assets of such association, of every description, including the note hereinafter mentioned." Held, on demurrer, that this allegation was sufficient as to the question of plaintiff's appointment.

[1] Potter *v.* Merchants Bank, 28 N. Y., 641; Hayes *v.* Brotzman, 46 Md., 519. See, also, Frank *v.* Morrison, 58 Md., 423.

[2] Helme *v.* Littlejohn, 12 La. An., 298. This was an action by the receiver of a partnership, who upon the trial, to prove his official capacity, introduced a certificate of the judge of the court, certifying his appointment in the action after considering the evidence, the pleadings and the law. It was objected that the certificate did not show that the judge had the proper parties before him, and that the receiver should have produced the entire record. Merrick, C. J., says: "There is force in the objection under the ordinary rules of evidence. But we think that to require the receiver to produce in every suit he may be required to bring a transcript of all the proceedings in the suit in which he received his appointment, would in a great measure deprive the parties of the benefit of his appointment, and unnecessarily increase the cost of every suit brought by the receiver. We think that the certified copy of the entry alone making the appointment ought to be deemed *prima facie* proof that the court had the proper parties before it when the appointment was made, leaving the opposite side to rebut the presumption."

III. Suits by Receivers in Foreign Courts.

§ 239. Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine, established by the Supreme Court of the United States and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and can not, as a matter of right, go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due to the person or estate subject to his receivership. His functions and powers, for the purposes of litigation, are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states, which recognize the judicial decisions of one tribunal as conclusive in another, do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction.[1] Where, therefore, upon a creditors' bill filed against a judgment debtor in the courts of New York, a receiver was appointed of all the assets and effects

[1] Booth *v.* Clark, 17 How., 322; Farmers & Merchants Insurance Co. *v.* Needles, 52 Mo., 17; Warren *v.* Union National Bank, 7 Phila., 156; Hope Mutual Life Ins. Co. *v.* Taylor, 2 Rob. (N. Y.), 278; Brigham *v.* Luddington, 12 Blatchf., 237; Hazard *v.* Durant, 19 Fed. Rep., 471. See, also, Graydon *v.* Church, 7 Mich., 36; Olney *v.* Tanner, 10 Fed. Rep., 101, affirmed on appeal, 21 Blatchf., 540; Bartlett *v.* Wilbur, 53 Md., 485. But see, *contra*, Metzner *v.* Bauer, 98 Ind., 425. And see Runk *v.* St. John, 29 Barb., 585.

of the debtor, and the debtor afterward went into New Hampshire, and took the benefit of the national bankrupt act, and an assignee was appointed of his estate, upon a bill filed by the New York receiver, in the District of Columbia, to get possession of a fund due to the debtor, it was held upon appeal that the court below properly dismissed the bill, since it could not recognize the power of a receiver to institute the proceedings in a jurisdiction other than that of his appointment.[1] Nor does the fact that the

[1] Booth *v.* Clark, 17 How., 322, the leading case upon the subject. The court, Mr. Justice Wayne delivering the opinion, say, p. 338: "He (the receiver) has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. In those countries of Europe, in which foreign judgments are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the states as to judgments and decrees, aided as it is by the first section of the fourth article of the constitution, and by the act of congress of 26th of May, 1790, by which full faith and credit are to be given in all of the courts of the United States, to the judicial sentences of the different states, a receiver under a creditors' bill has not as yet been an actor as such in a suit out of the state in which he was appointed. This court considered the effect of that section of the constitution, and of the act just mentioned, in McElmoyle and Cohen, 13 Pet., 324–327. But, apart from the absence of any such case, we think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his ap-

receiver is appointed by a federal court in one circuit, and sues as receiver in the federal court in another circuit, alter the rule, or entitle him to maintain the action, since such courts exercise only a local and limited jurisdiction, and their receivers can not sue in another territorial jurisdiction.[1]

§ 240. In further illustration of the rule, it has been held in a garnishee proceeding instituted in the courts of Pennsylvania, against a debtor of a corporation existing in and under the laws of the state of Tennessee, where judgment was had against the garnishee, that a receiver of the Tennessee corporation, appointed in a creditors' suit in that state, could not contest plaintiffs' right to the verdict obtained by them in the garnishee suit in Pennsylvania.[2] So where an insurance company, incorporated under the laws of Illinois, had passed into the hands of a receiver duly appointed in that state, it was held in Missouri, that the receiver could not maintain an action in the latter state upon a note running to the corporation, and that the suit must be brought in the name of the corporation itself.[3]

pointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

[1] Brigham *v.* Luddington, 12 Blatchf., 237.

[2] Warren *v.* Union National Bank, 7 Phila., 156. See, also, Willitts *v.* Waite, 25 N. Y., 577; Hunt *v.* Columbian Insurance Co., 55 Me., 290; Taylor *v.* Columbian Insurance Company, 14 Allen, 353.

[3] Farmers and Merchants Insurance Co. *v.* Needles, 52 Mo., 17. See, also, Hope Mutual Life Insurance Co. *v.* Taylor, 2 Rob. (N. Y.), 278. In Farmers and Merchants Insurance Co. *v.* Needles, 52 Mo., 17, Ewing, J., observes, p. 18: "This is an action on a promissory note alleged to have been executed by defendant to plaintiff. An amended petition was filed, which alleges substantially that the insurance company is a corporation duly incorporated under the laws of the state of Illinois, with power to sue, etc.; that W. H. Benneson was duly appointed receiver by the circuit court of Adams county, in the state of Illinois, with the rights, property and assets of the plaintiff, in 1869, and gave bond which was duly approved, etc. That as such receiver he is in possession of the property and effects of said corporation. The petition then alleges

§ 241. While, as is thus seen, the courts have generally denied the receiver's extraterritorial right of action as a question of strict right, it has frequently been recognized as a matter of comity.[1] Thus, it has been held that receivers of a foreign corporation, appointed in other states, might sue in New York, in their official capacity, in cases where no detriment would result to citizens of the latter state, the privilege of thus suing being regarded as based rather upon courtesy than upon strict right, and the courts declining to extend their comity so far as to work detriment to citizens of their own state who have been induced to give credit to the foreign corporation.[2] And in Indiana, it is

the execution of the note by defendant to plaintiff, said corporation, and that said note is part of the assets and property which came to the hands of said receiver, and that the same is due and unpaid. . . It is admitted by the demurrer that Benneson was duly appointed receiver, and as such is in possession of the property and effects of the corporation, including the note in controversy. And as it does not appear by any averment in the petition that the note has ever been assigned or transferred by the payee thereof, the corporation only can maintain an action thereon, unless the receiver as such has a right of action. A receiver can not sue in a foreign jurisdiction for the property of the debtor."

[1] Runk *v.* St. John, 29 Barb., 585; Hoyt *v.* Thompson, 5 N. Y., 320, reversing S. C., 3 Sandf., 416; Bagby *v.* A., M. & O. R. Co., 86 Pa. St., 291; Bank *v.* McLeod, 38 Ohio St., 174; Metzner *v.* Bauer, 98 Ind., 425; McAlpin *v.* Jones, 10 La. An., 552; Lycoming Fire Insurance Co. *v.* Wright, 55 Vt., 526. And see Bidlack *v.* Mason, 26 N. J. Eq., 230; Hunt *v.* Columbian Insurance Co., 55 Me., 290; Taylor *v.* Columbian Insurance Co., 14 Allen, 353.

[2] Runk *v.* St. John, 29 Barb., 585; Hoyt *v.* Thompson, 5 N. Y., 320, reversing S. C., 3 Sandf., 416. In Runk *v.* St. John, 29 Barb., 585, the court, Clerke, J., say: "The plaintiffs are receivers of a corporation chartered in the states of Pennsylvania and New Jersey, and were appointed under the decree dissolving the corporation, made by the court of chancery in the latter state, and were confirmed by an act of the legislature of the former. The defendant's counsel denies the capacity of receivers, appointed in other states and countries, to sue in the courts of this state. The laws and proceedings of other sovereignties have not, indeed, such absolute and inherent vigor as to be efficacious here under all circumstances. But in most instances, they are recognized by the courtesy of the courts of this state; and the right of foreign assignees or receivers to collect, sue for, and recover the property of the individuals or corporations they

held, as a matter of comity, that receivers duly appointed and qualified in another state may, to the extent of their authority, maintain actions in the courts of Indiana.[1] Upon similar grounds of comity it is held in Pennsylvania, that when a receiver is appointed over a railway in another state, the courts of Pennsylvania will recognize his right to property of the railway company in Pennsylvania, when not in conflict with the rights of citizens of that state. And in such case, a creditor residing in the state in which the receiver is appointed will not be permitted by attachment proceedings in Pennsylvania, to reach the assets and credits of the company claimed by the receiver.[2] So a receiver over a railway appointed in foreclosure proceedings in Kentucky, with full power to take possession of all property of the company and to institute all necessary actions in his own name, may maintain an action in Ohio, to recover rolling stock of the company covered by the mortgages, which has been seized in Ohio, by a Kentucky creditor, pending the application for the receiver and before his appointment.[3] And when property to which a receiver is entitled has been fraudulently removed beyond the jurisdiction of the court appointing him and into another state, he has been allowed to maintain an action in such other state for its recovery.[4] So a receiver over a foreign corporation, appointed in the state of its creation, may be admitted to defend an action brought against the corporation in New

represent, has never been denied, except where their claim came in conflict with the rights of creditors in this state. All that has been settled by the decisions to which we have been referred on this subject, is, that our courts will not sustain the lien of foreign assignees or receivers, in opposition to a lien created by attachment under our own laws. In other words, we decline to extend our wonted courtesy so far as to work detriment to citizens of our own state, who have been induced to give credit to the foreign corporation."

[1] Metzner *v.* Bauer, 98 Ind., 425.

[2] Bagby *v.* A., M. & O. R. Co., 86 Pa. St., 291.

[3] Bank *v.* McLeod, 38 Ohio St., 174.

[4] McAlpin *v.* Jones, 10 La. An., 552. See, also, Paradise *v.* Farmers & Merchants Bank, 5 La. An., 710.

Jersey, both as a matter of comity and under a statute subjecting foreign corporations to the provisions of the state law. And when thus admitted to defend an action brought upon a mortgage given by the corporation, he may question its validity, being regarded for that purpose as the representative both of the corporation and of its creditors.[1] It is thus apparent that the exceptions to the rule denying to receivers any extraterritorial right of action have become as well recognized as the rule itself, and the tendency of the courts is constantly toward an enlarged and more liberal policy in this regard. And it is believed that the doctrine will ultimately be established giving to receivers the same rights of action, in all states of the Union, with which they are invested in the state or jurisdiction in which they are appointed.

§ 242. It has also been held that a receiver of an insolvent corporation, appointed by the courts of a particular state, may prove a debt in bankruptcy due to the estate which he represents, although the proceedings in bankruptcy are pending in a federal court in a state other than that in which the receiver was appointed. The federal court in which the bankruptcy proceedings are pending will, it is held, take judicial notice of the laws of all the states and of the powers of the state officers, whether executive or judicial. And the receiver, being clothed with full power to represent the corporation by the laws of the state where he is appointed, stands, by virtue of his appointment, in the shoes of the corporation, and will be allowed to prove a claim in bankruptcy in the federal court of another district as fully as if vested with his powers as receiver by virtue of a decree of a court within the district in which the proceedings in bankruptcy are pending.[2]

[1] National Trust Co. *v.* Miller, 33 N. J. Eq., 155.

[2] *Ex parte* Norwood, 3 Biss., 504. "To my mind," says Blodgett, J., p. 512, "there is, to say the least, a strong analogy between the right of the receiver in this case to prove the debt due the estate he represents, and the right of the executor or administrator appointed in an-

§ 243. Where a citizen of one state has recognized the appointment of a receiver in another state, by incurring obligations to him in his official capacity, sufficient to create a right of action, there would seem to be no satisfactory reason, either upon principle or authority, why the receiver

other state to represent the right of a deceased creditor before this court, and prove a debt due his testator or intestate, and such right has never been drawn in question. Under authority of all the bankrupt laws which have been passed by the congress of the United States, the practice has been uniform, so far as I can ascertain, to allow guardians, executors, administrators, and all persons acting in a representative capacity, to appear before the bankrupt court and prove the claims pertaining to the estate which they severally represent. If the bankruptcy proceedings in this case were pending before a United States court in the state of New York, there can be no doubt that such a court would recognize the rights of the receiver in this case, and allow him to prove this claim. Why should a federal court of the state of New York recognize the authority of this receiver, appointed under the laws of the state of New York, without any relation to the federal laws or the bankrupt law, any more than this court should? Do state lines make any difference? The federal courts take judicial notice of the laws of all the states and of the powers of all state officers, whether executive or judicial. It seems to me it would be applying a very narrow rule to the provisions of the bankrupt law, and limit the usefulness of that statute very considerably, if the federal courts should require all executors, administrators, guardians of minors, or conservators of insane or idiotic persons, as a condition precedent to the proving of their claims against the estate of their debtors, to take out auxiliary or supplemental letters of administration or guardianship from the state courts, within the jurisdiction of the court where the bankruptcy proceedings were pending. The bankrupt law is national in its application. It is intended to serve all creditors alike, and gives all creditors acting in a representative capacity, resident out of the district, as well as those within the district wherein the proceedings are pending, all the rights to prove their debts which natural persons might exercise, and it seems to me that this court would do gross injustice to the principles of the law to hold that this receiver, clothed as he is with full powers, by the laws of the state of New York, to represent the estate of the Lorillard Insurance Company, and standing, by virtue of the decree of the supreme court of the state of New York, in the shoes and place of the Lorillard Fire Insurance Company, should not be allowed to prove his debt here as fully as if he had been vested with those powers by virtue of a decree from any court within this district."

should not be allowed to maintain his action in the state where such citizen resides. It has accordingly been held, where a mortgage of property situated in one state was executed to receivers appointed by the courts of another state, and the receivers resigned, and successors were duly appointed, that such successors to the original receivers might maintain an action in their own names to foreclose the mortgage in the state where the premises were located, and that the use of the word receivers, in such case, was merely a description of the person.[1]

§ 244. When the rights of the receiver do not rest merely upon his appointment by the courts of another state, but, in addition thereto, and for the purpose of carrying out the objects of the receivership, the defendant over whom he is appointed has made an assignment of all his property to the receiver, sufficient to pass the title to real estate, which assignment is recorded in the proper recorder's office in another state where real property of the defendant is situated, the receiver may, by virtue of such assignment, bring an action in that jurisdiction concerning the property. In such case, he sues, not strictly in his official capacity as receiver by virtue of his appointment in the former state, but in his capacity as assignee, and his designation as receiver may be treated as a *descriptio personæ*. And he need not go behind the assignment and prove the prior proceedings, or any order of the court appointing him, but the matters in the assignment will be taken as true until disproven.[2] So when a court, having jurisdiction of the parties and of the subject-matter, and having the property in controversy within its control, appoints a receiver over such property, who reduces it to actual possession, and sends it under the order of the court into another state for sale, where it is attached, the receiver may maintain replevin in the latter state to recover the property. And in such case, third persons, not parties to the original suit in which the

[1] Iglehart *v.* Bierce, 36 Ill., 133.

[2] Graydon *v.* Church, 7 Mich., 36.

receiver was appointed, can not avail themselves of irregularities in his appointment.[1] But the courts of Texas have refused to recognize a title acquired by a receiver appointed in another state to real estate in Texas, as against creditors in that state, upon the ground that the receiver has no official capacity or power beyond the jurisdiction of the court creating him. Thus, when attaching creditors in Texas levied upon lands of a Tennessee corporation, over which a receiver had been appointed in the latter state, and to whom a conveyance of the lands had been executed under his receivership, it was held that the title thus acquired could not prevail as against the attachment proceedings.[2]

§ 244 *a*. In an action brought by a receiver deriving his appointment from the courts of another state, if the jurisdiction of the court appointing him is denied by answer, and no proof is offered as to the powers of such court, either from the laws of the state or otherwise, its jurisdiction to appoint a receiver will not be presumed, when it does not appear from the record whether it was a court of general or of special jurisdiction.[3]

[1] Cagill *v.* Wooldridge, 8 Baxter, 580. And see C., M. & St. P. R. Co. *v.* Packet Co., 108 Ill., 317.

[2] Moseby *v.* Burrow, 52 Tex., 396.

[3] Kronberg *v.* Elder, 18 Kan., 150.

IV. Defenses to Actions by Receivers.

§ 245. Since the appointment of a receiver *in limine* does not affect any questions of right involved in the action, and does not change any contract relations or rights of action existing between parties,[1] it follows as a general rule that in ordinary actions brought by a receiver in his official capacity, to recover upon an obligation or demand due to the person or estate which has passed under the receiver's control, the defendant may avail himself of any matter of defense which he might have urged had the action been brought by the original party, instead of by his receiver.[2] For example, when a banking corporation advances money to a depositor, upon his agreement that his balance on deposit, and that of the firm of which he is a member, shall be applied in payment of the advances, such agreement amounts to an equitable appropriation of the balances, and if the bank passes into the hands of a receiver before the

[1] Williams *v.* Babcock, 25 Barb., 109; Bell *v.* Shibley, 33 Barb., 610. And see Savage *v.* Medbury, 19 N. Y., 32; Shaughnessy *v.* The Rensselaer Insurance Co., 21 Barb., 605.

[2] Moise *v.* Chapman, 24 Ga., 249; Devendorf *v.* Beardsley, 23 Barb., 656. See, also, Williams *v.* Babcock, 25 Barb., 109; Thomas *v.* Whallon, 31 Barb., 172; Colt *v.* Brown, 12 Gray, 233; Van Wagoner *v.* Paterson Gas Light Co., 3 Zab., 283; Berry *v.* Brett, 6 Bosw., 627; Hyde *v.* Lynde, 4 N. Y., 387.

balances are actually thus applied, and an action is brought for the receiver's use upon the note given for such advances, the defendant is entitled to have such balances deducted from the amount due, to the same extent as if they had actually been thus applied on the books of the bank.[1]

§ 246. Where, however, the defense relied upon in an action brought by a receiver of a corporation is that the note or obligation upon which the receiver sues was given without consideration, and in aid of a fraudulent and illegal transaction, such defense can not be maintained if it is apparent that all parties to the transaction, including the defendant himself, were participants in the fraud.[2]

§ 247. The question as to the grounds which may be urged in defense of actions brought by receivers is most frequently presented in cases where it is sought to interpose a demand due to the defendant by way of set-off to the receiver's action. The general principle governing this subject seems to be, as regards demands or choses in action in favor of the original party over whom a receiver is appointed, that the receiver takes such choses in action subject to any equitable set-offs which defendant might have urged against the original party holding the legal title.[3] Thus, when receivers of a banking corporation institute an action upon a promissory note or bill of exchange due to the bank, the defendant will be allowed to set off against such demand bills and notes of the bank, received by him in the ordinary course of business before the insolvency of the bank, or before the injunction sequestrating and setting apart the assets of the bank for the benefit of its creditors.[4] But the bills of the bank received after such injunction will not be

[1] Chase *v.* Petroleum Bank, 66 Pa. St., 169.

[2] Farmers & Mechanics Bank *v.* Jenks, 7 Met., 592.

[3] Colt *v.* Brown, 12 Gray, 233. See, also, Hade *v.* McVay, 31 Ohio St., 231.

[4] Colt *v.* Brown, 12 Gray, 233; Van Wagoner *v.* Paterson Gas Light Co., 3 Zab., 283. And see, further, as to set-offs which may be allowed by receivers of banking corporations, State Bank *v.* Receivers of Bank of New Brunswick, 2 Green Ch., 266.

allowed as a set-off.[1] In accordance with the same general principle, it is held that in an action by the receiver of an insolvent insurance company, to recover upon a premium note given for a policy of insurance, the maker of the note may set off a demand in his favor against the company, which was liquidated before the receiver's appointment.[2] But in an action by a receiver of an insolvent bank to recover upon a demand due to the bank, if defendant seeks to set off a demand against the bank, the burden of proof rests upon him to show that such demand accrued in his favor before the receivership.[3] And in such case, a cause of action or demand against the bank, which is assigned to the defendant after the filing of the bill for a receiver, or after his appointment, can not be set off against the receiver's action.[4]

§ 248. The general rule above stated as to set-offs in this class of actions is recognized in New Jersey, in actions brought by a receiver of an insolvent corporation appointed under a statute for the prevention of frauds by incorporated companies, the statute fixing the functions of such receivers and authorizing them to allow just set-offs in all cases where it shall appear that they ought to be allowed according to law or equity. The transfer of the property from the corporation to its receivers in such case, being by operation of law, passes all rights of the corporation in the same condition, and subject to the same equities, as when held by the corporation itself. And when the receivers of an insolvent banking corporation, appointed under such a statute, sue upon a note due to the bank, the makers of such note may set off against the demand the amount of their deposit in the bank at the time of its insolvency.[5] The rule is other-

[1] Colt *v.* Brown, 12 Gray, 233.

[2] Berry *v.* Brett, 6 Bosw., 627.

[3] Smith *v.* Mosby, 9 Heisk., 501.

[4] Lanier *v.* Gayoso Savings Institution, 9 Heisk., 506; Van Dyck *v.* McQuade, 85 N. Y., 616.

[5] Van Wagoner *v.* Paterson Gas Light Co., 3 Zab., 283. "The assignment to the receiver," says Green, C. J., p. 292, "being by operation of law, passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same

wise, however, when the debts do not exist between the parties in the same right or capacity. Thus, when the action is brought by a receiver of an insolvent bank against a shareholder to recover an unpaid subscription to capital stock, the defendant can not set off the amount of his individual deposit in the bank, since the capital stock is a trust fund for the benefit and security of creditors, and to allow a shareholder to set off a debt due to him from the bank in such case would give him preference as a creditor.[1]

§ 249. It is also to be observed that the rule recognizing such set-offs to actions brought by receivers as might have been urged in defense of the action as between the original parties, does not extend to demands in defendant's favor accruing after the receiver's appointment. And in an action upon a promissory note, brought by a receiver of the payee against the maker, the defendant will not be allowed to set off a demand alleged to be due to him from the payee, but which had not accrued before maturity of the note, or before the receiver was appointed.[2] But in an action brought by a receiver in his official capacity to recover upon a note due to the estate over which he is appointed, the defendant is entitled by way of counter-claim to a demand for services

equities, as the corporation held them. The receivers are not assignees for a valuable consideration, in the ordinary sense of that term, but are regarded as voluntary assignees and personal representatives of the corporation. The statute, moreover, in cases of mutual dealing between the corporation and any other person or persons, expressly authorizes the receivers to allow just set-offs in favor of such persons in all cases in which it shall appear to the receivers that the same ought to be allowed according to law and equity. The claim of the defendants in this case does not, as has been seen from technical considerations, constitute a set-off at law. But as the claim was a clear, legal and equitable set-off against the bank at the time of the insolvency, and as the receivers took the rights and property of the corporation in the same plight and condition, and subject to the same equities, that the bank held them, it is clear that the claim of the defendants is an equitable set-off against the demand of the receivers."

[1] Williams v. Traphagen, 38 N. J. Eq., 57.

[2] United States Trust Co. of New York v. Harris, 2 Bosw., 75.

which he has rendered to the receiver, under an employment by the latter for the benefit of the estate.[1] And one who has rendered services to a corporation pending an action for the appointment of a receiver over its property, but before the property passes into the receiver's hands, may set off the value of such services against a demand due from him to the corporation prior to the receivership, but can not set off an account for services rendered after the receivership.[2]

§ 250. Where the receiver, for the purposes of the litigation, is the representative, not of the title or interest of the original party, but of creditors for whose benefit he sues, a different principle prevails, and in such case no set-off can be allowed in favor of the defendant upon a demand against the original party, which is not binding against the receivers in the capacity in which they act. Thus, in an action brought by receivers of an insolvent corporation against a shareholder, for the recovery of illegal dividends paid by the corporation while in a condition of insolvency, the defendant can not set off against the demand of the receivers a claim growing out of independent matters between the corporation and himself. The foundation of the action being the illegal payment of dividends in fraud of the creditors, and the reparation sought being the restoration of the fund for the creditors' benefit, the receiver is regarded as the representative of the creditors and not of the corporation, and hence the defense is unavailable.[3]

§ 251. It is also held, that in an action by receivers of an insolvent banking corporation, to recover notes of the bank illegally transferred to one of its directors knowing the insolvent condition of the bank, the defendant can not be allowed by way of counter-claim the amount actually paid by him for the notes, since such defense rests upon his own illegal conduct.[4]

§ 252. In an action by the receiver of an insolvent debtor, appointed in behalf of creditors, upon notes due to

[1] Davis *v.* Stover, 58 N. Y., 473.
[2] Cook *v.* Cole, 55 Iowa, 70.
[3] Osgood *v.* Ogden, 4 Keyes, 70.
[4] Gillet *v.* Phillips, 13 N. Y., 114.

the debtor, the maker of such notes can not set off against the action a judgment which he has obtained against the receiver upon a note of the debtor, since this would virtually give the defendant a preference over the other creditors; and the judgment in defendant's favor against the receiver is treated as being only a legal determination of the amount and validity of defendant's demand, and not that it shall take preference over demands of other creditors.[1]

§ 253. Where the assets of a partnership pass into the hands of a receiver to await a settlement between the partners, and are sold by him under order of the court, in an action brought by the receiver to recover the purchase price, the purchaser can not set off a claim or demand which he himself holds against the partnership, as for rent of premises occupied by the firm; since to allow such a set-off would be to give the defendant a preference over other creditors.[2]

§ 253 *a*. When receivers over an insolvent corporation in New York, receive as part of the assets of the corporation notes due from a resident of Massachusetts, it is no defense to an action brought by the receivers upon such notes in New York, that, after the receivers' appointment, the notes were attached in an action brought by a creditor of the corporation in Massachusetts. In such case, the notes being transferred to receivers in New York, for the benefit of creditors, they are not subject to the jurisdiction of the courts of another state.[3]

[1] Clark *v.* Brockway, 3 Keyes, 13; S. C., 1 Ab. Ct. Ap. Dec., 351.

[2] Singerly *v.* Fox, 75 Pa. St., 112.

[3] Osgood *v.* Maguire, 61 N. Y., 524.

V. Actions against Receivers.

§ 254. A receiver being an officer of the court, acting under its direction, and in all things subject to its authority, it is contrary to the established doctrine of courts of equity to permit him to be made a party defendant to litigation, unless by consent of the court appointing him. And it is in all cases necessary that a person desiring to bring suit against a receiver in his official capacity, should first obtain leave of the court by which he was appointed, since the courts will not permit the possession of their officers to be disturbed by suit or otherwise, without their consent and permission.[1] The rule is established for the protection of

[1] Taylor *v.* Baldwin, 14 Ab. Pr., 166; Wray *v.* Hazlett, 6 Phila., 155; DeGroot *v.* Jay, 30 Barb., 483; S. C., 9 Ab. Pr., 364; Miller *v.* Loeb, 64 Barb., 454; Randfield *v.* Randfield, 3 DeG., F. & J., 766, reversing S. C., 1 Dr. & Sm., 310; Keen *v.* Breckenridge, 96 Ind., 69; Melendy *v.* Barbour, 78 Va., 544; Barton *v.* Barbour, 104 U. S., 126, affirming S. C., 3 MacArthur, 212; Searle *v.* Choate, 25 Ch. D., 723; Graffenried *v.* Brunswick & Albany R. Co., 57 Ga., 22; Thompson *v.* Scott, 4 Dill.,

receivers against unnecessary and expensive litigation, and in most instances a party aggrieved may have ample relief by application on motion to the court appointing the receiver. And when an action is instituted against a receiver in his official capacity, without first obtaining leave of the court, the plaintiff in such action is guilty of a contempt of court and will be punished accordingly.[1] It is not, however, usual for the court to refuse leave to a person upon application to contest a right which he claims as against a receiver, unless it is perfectly apparent that there is no foundation for the demand.[2] But to warrant a court in granting leave to sue its receiver, the applicant should show by his petition at least a probable ground of recovery; and when, upon the face of his petition, it is apparent that he has no cause of action, leave will not be granted.[3] And it is neces-

508; S. C., 3 Central Law Journal, 737; Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704; Meredith Village Savings Bank *v.* Simpson, 22 Kan., 414. See, also, Evelyn *v.* Lewis, 3 Hare, 472; *In re* Persse, 8 Ir. Eq., 111; Parr *v.* Bell, 9 Ir. Eq., 55; Tink *v.* Rundle, 10 Beav., 318; Payne *v.* Baxter, 2 Tenn. Ch., 517. See, *contra*, Kinney *v.* Crocker, 18 Wis., 74; Paige *v.* Smith, 99 Mass., 395; St. Joseph & Denver City R. Co. *v.* Smith, 19 Kan., 225.

[1] Thompson *v.* Scott, 4 Dill., 508; S. C., 3 Central Law Journal, 737; Taylor *v.* Baldwin, 14 Ab. Pr., 166; DeGroot *v.* Jay, 30 Barb., 483; S. C., 9 Ab. Pr., 364. In the latter case, as reported in 30 Barb., 483, the court observe, p. 484: "The receiver is the officer of the court, and, by the well-settled practice, permission of the court was necessary to warrant an action against him. This rule is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. It is a contempt of the court to sue a receiver without such permission. In most cases of claims against a receiver, or the fund or property in his hands, the remedy by special motion is adequate. Any person having such a claim may resort to this summary remedy. The fund or property being held by the court, by its receiver, in trust for those entitled to it, or to be paid out of it, the court may administer justice to claimants without suit, upon special application. In the present case, all the relief sought, to which the plaintiff is entitled, might be obtained in that mode. And that mode is commended by considerations of economy as well as expedition."

[2] Randfield *v.* Randfield, 3 DeG., F. & J., 766, reversing S. C., 1 Dr. & Sm., 310.

[3] Jordan *v.* Wells, 3 Woods, 527.

sary to aver in the complaint or declaration against a receiver, that leave of court has been granted to bring the action, and the absence of such an averment is fatal upon demurrer.[1]

§ 254 *a*. The authorities are far from reconcilable upon the question whether the want of leave to bring an action against a receiver is jurisdictional, and therefore fatal to maintaining the action, or whether it is merely an omission, which will subject the party suing without such leave to proceedings for contempt of the court appointing the receiver, but without impairing the jurisdiction of that court to proceed with and determine the cause. The weight of authority, however, seems to support the proposition that leave to sue the receiver is jurisdictional in its nature, and that its omission is fatal to maintaining the action.[2] And upon an application to the court for leave to sue its receiver, the court may determine the forum in which the action shall be brought. It may therefore grant leave to sue the receiver in its own jurisdiction, and may refuse to permit him to be sued in another court. And when the order is made in this form, and the action is brought in the court by which the receiver was appointed, but the plaintiff then files a petition and bond for the removal of the cause to a federal court, it is not error for the former court, of its own motion, to revoke the permission to sue its receiver and to dismiss the action.[3]

[1] Keen *v.* Breckenridge, 96 Ind., 69.

[2] Barton *v.* Barbour, 104 U. S., 126, affirming S. C., 3 MacArthur, 212; Keen *v.* Breckenridge, 96 Ind., 69. See, *contra*, Kinney *v.* Crocker, 18 Wis., 74; St. Joseph & Denver City R. Co. *v.* Smith, 19 Kan., 225. In the case last cited it is held that the ordinary jurisdiction of the courts is not taken away or impaired by the appointment of a receiver by another court, and while that court may draw to itself all controversies to which he is a party, it does so by acting directly upon the parties to such controversies, and not by challenging the jurisdiction of other tribunals. When, therefore, a receiver is sued in a court other than that by which he was appointed, an averment in his answer that he is such receiver raises no question as to the jurisdiction of the court in which the action is brought.

[3] Meredith Village Savings Bank *v.* Simpson, 22 Kan., 414.

§ 254 *b*. The more common practice, and that which has been generally commended by the courts, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed, without remitting the parties to a new and independent suit. And it rests wholly within the discretion of the court to grant leave to bring an independent action against its receiver, or to determine the controversy upon petition in the original cause, directing, if necessary, an issue to be tried by a jury as to questions of fact or of damages.[1] And the right to a trial by jury in such cases is wholly discretionary with the court, which may direct the issues of fact to be tried by a jury, or may refer them to a master for determination.[2] And it is proper for the court, when application is made for leave to sue its receiver, to investigate the subject-matter of the petition, and if it appears that the case is free from difficulty, or that it involves no question which must necessarily be determined by an action at law, the court may itself determine the matter upon petition.[3] So if an equitable right or title is asserted in property which is in the custody of a receiver, the court will not ordinarily permit an action to be brought against him, but will require the claimant to proceed by petition.[4] And persons having a claim or lien upon a fund in a receiver's hands should assert such claim by petition, rather than by an action against the receiver.[5] If, however, the cause of action is in tort, it is regarded as the more appropriate practice to apply for leave to bring an action, rather than to submit the matter upon petition.[6]

§ 255. While it is the more commonly recognized practice for persons having claims or demands against an estate,

[1] Melendy *v.* Barbour, 78 Va., 544; Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704.

[2] Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704.

[3] Lehigh C. & N. Co. *v.* Central R. Co., 38 N. J. Eq., 175.

[4] Porter *v.* Kingman, 126 Mass., 141.

[5] Olds *v.* Tucker, 35 Ohio St., 581.

[6] Palys *v.* Jewett, 32 N. J. Eq., 302.

over which a receiver is appointed, to apply, by petition or otherwise, to the court appointing the receiver for the relief desired, yet this method of obtaining redress does not exclude the remedy by action against the receiver, in cases where an action is proper. And when complaint is made against a receiver for injuries sustained by reason of negligence in the discharge of his official duties, the court appointing him may either take cognizance of the complaint and administer justice between the parties, or it may permit the party aggrieved to bring his action for the injury sustained. And in case of an action brought against the receiver of a railway corporation, for injuries alleged to have been sustained through negligence of employees in the management of the road, the receiver can not object to the action that he is a public officer, and as such not responsible in his official capacity for the negligence of his employees.[1] But it may be observed generally, that in actions instituted against receivers in their official capacity, the receiver incurs no personal liability, and whatever judgment is obtained against him should be so entered as to be enforced only out of funds properly chargeable to him in the capacity of receiver.[2]

§ 256. Courts of equity are so jealous of permitting any unauthorized interference with their receivers, that they frequently interpose by injunction to restrain the prosecution of actions against them, when leave of court has not been first obtained.[3] And when a person is proceeding to assert his claims to property held by a receiver, by an action at law, without obtaining permission of the court to bring such action, the court may, on application of the receiver, enjoin him from proceeding with his suit, regardless of however clear his right may appear to be, or of whether

[1] Meara's Administrator *v.* Holbrook, 20 Ohio St., 137.

[2] Commonwealth *v.* Runk, 26 Pa. St., 235; Meara's Administrator *v.* Holbrook, 20 Ohio St., 137.

[3] Evelyn *v.* Lewis, 3 Hare, 472; Tink *v.* Rundle, 10 Beav., 318; *In re* Persse, 8 Ir. Eq., 111; Parr *v.* Bell, 9 Ir. Eq., 55.

he was apprised of the receiver's appointment at the time of bringing his action.[1] So when a railroad company has instituted proceedings to condemn for the use of its road certain real estate in the custody of a receiver, without obtaining leave of court, an injunction has been allowed *ex parte*, to restrain the company from proceeding until further order.[2] And where tenants, without leave of court, have brought actions of replevin or of trespass against a receiver, who has distrained for their rent, they may be enjoined from proceeding with such actions.[3]

§ 257. Notwithstanding the extreme jealousy thus shown by the courts in protecting their receivers against unauthorized interference by suit, such protection will not be extended to acts which are outside and in excess of the functions of the receiver, or to matters in which he occupies the attitude of a mere trespasser, as in dealing with or assuming possession and control of property which is not embraced in his receivership. And when suit is brought against a receiver in another court for acts committed by him as an individual, as for taking and retaining possession of property not pertaining to his receivership, and as to which he is a mere trespasser, such action will not be enjoined by the court appointing the receiver.[4] And an action of replevin has been maintained for the recovery of such property, although leave of court had not been obtained to bring the action. And it has been held that an action against a receiver in his official capacity, concerning matters pertaining to his receivership, would not be enjoined, on motion of the receiver, upon the ground that the matters in controversy have been passed upon by the court in other proceedings, since, if this be true, it furnishes a complete and sufficient defense to the action sought to be enjoined, and the receiver should avail himself of it in that action.[5]

[1] Evelyn *v.* Lewis, 3 Hare, 472.

[2] Tink *v.* Rundle, 10 Beav., 318.

[3] *In re* Persse, 8 Ir. Eq., 111; Parr *v.* Bell, 9 Ir. Eq., 55.

[4] *In re* Young, 7 Fed. Rep., 855. And see Curran *v.* Craig, 22 Fed. Rep., 101.

[5] Jay's Case, 6 Ab. Pr., 293.

§ 258. As regards actions instituted against a debtor or person over whom a receiver is appointed, there would seem to be no necessity for making the receiver a party defendant to such actions, where the rights and remedies of the plaintiff terminate with the original debtor, and where the receiver is not to be adjudged or compelled to do anything for plaintiff's benefit. And in order to make the receiver a proper co-defendant with the original debtor in an action against the latter, some right to relief at the receiver's hands should be stated, and some relief prayed as against him.[1] But it is to be observed with reference to actions already begun against a debtor, over whose affairs a receiver is subsequently appointed, that the receiver can have no *status* in court until he has become a party to the action, the proper course, if he desires to be made a party, being to apply to the court for that purpose; and until this is done he can not appear or take any action in the cause.[2]

§ 259. The appointment of a receiver over the effects of one of the defendants, in an action for the foreclosure of a mortgage, constitutes no bar to the continuance of the action, if properly begun; and such appointment can at most only render the action defective as to parties, so as to render it necessary for the plaintiff to bring the receiver before the court by a supplemental bill in the nature of a bill of revivor. And even this course is not necessary where the parties in interest are sufficiently represented before the court to enable it to properly determine the controversy.[3]

§ 260. In an action to foreclose a mortgage given by a corporation, when a decree *pro confesso* is taken against the corporation, by which plaintiff's right to recover is established, and receivers of the corporation are afterward ap-

[1] Arnold *v.* Suffolk Bank, 27 Barb., 424. As to the right of a receiver to be admitted to defend an action brought against the persons over whose affairs he is appointed, see Honegger *v.* Wettstein, 94 N. Y., 252.

[2] Tracy *v.* First National Bank of Selma, 37 N. Y., 523.

[3] Wilson *v.* Wilson, 1 Barb. Ch., 592.

pointed, it is not necessary that they should be made parties defendant to the proceeding, although the court may properly admit them as parties at any stage of the cause, if they seek to be so admitted.[1] And the question whether a receiver shall be permitted to defend an action brought against the person or corporation over whose affairs he is appointed, rests wholly in the discretion of the court appointing him, and is not a matter of right upon the part of the receiver. When, therefore, a receiver of a corporation is denied permission to defend an action for the foreclosure of mortgages given by the corporation, such action of the court will not be reversed upon appeal.[2] But when a corporation is dissolved, and a receiver is appointed in an action in the state of its domicile, and a court of another state proceeds to render judgment against the corporation in an action there pending, without making the receiver a party, such judgment is not binding against the receiver of the corporation in the state where it was dissolved.[3] And when the action will, if sustained, result in relieving the receivers of the corporation of a considerable portion of their duties, being equivalent to that extent to a removal from their office, it is manifestly proper and right that they should be made parties defendant, and be allowed an opportunity of being heard in their own behalf.[4]

§ 261. A motion to dismiss an action brought against a receiver, upon the ground that leave of the court was not first had before beginning the action, is waived by the appearance of counsel for the receiver, such appearance being an admission that the defendant has been regularly brought into court. Want of permission, therefore, to bring the action can not be urged as a ground for dismissal after such appearance on the part of the receiver.[5]

[1] Willink *v.* Morris Canal and Banking Co., 3 Green Ch., 377.

[2] Patrick *v.* Eells, 30 Kan., 680.

[3] McCulloch *v.* Norwood, 58 N. Y., 562, reversing S. C., 36 N. Y. Supr. Ct. R., 180.

[4] Smith *v.* Trenton Delaware Falls Co., 3 Green Ch., 505.

[5] Hubbell *v.* Dana, 9 How. Pr., 424. See, also, *In re* Young, 7 Fed. Rep., 855.

§ 262. Courts of equity will not ordinarily entertain a bill for an injunction against their receivers, the proper remedy for the party aggrieved being to apply to the court for leave to assert his rights and to enforce his remedies in the action in which the receiver was appointed.[1] And since a receiver, authorized by the court to bring an action, is bound to proceed therewith, the court will not permit him to be enjoined from so proceeding. The proper course, in such case, for parties dissatisfied with the receiver's conduct, is to apply to the court appointing him for relief, instead of seeking to enjoin him by another suit.[2]

§ 263. Where there are different and rival claimants to a fund in the hands of a receiver, each of whom has instituted proceedings against him for the fund, it is proper for the receiver to bring an action in the nature of a bill of interpleader against such claimants, and to compel them to interplead and to determine their conflicting rights to the fund.[3]

§ 264. It is held, in actions against receivers in their official capacity, that they can not, either expressly or impliedly, waive any legal or equitable defense on which their principal might have relied had the action been brought against him. Receivers of an insurance company can not, therefore, in an action brought against them to recover upon a policy of insurance issued by the company, waive or dispense with the conditions of the policy as to notice of loss.[4] And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer.[5] And he has the same right of appeal from an adverse judgment for the recovery of funds pertaining to his receivership, as the party over whom he was appointed would have had.[6]

[1] Smith *v.* Earl of Effingham, 2 Beav., 232.

[2] Winfield *v.* Bacon, 24 Barb., 154.

[3] Winfield *v.* Bacon, 24 Barb., 154.

[4] McEvers *v.* Lawrence, Hoffm., 172.

[5] Davis *v.* Duncan, 19 Fed. Rep., 477.

[6] Melendy *v.* Barbour, 78 Va., 544.

§ 265. Where persons apply for and obtain leave of court to bring an action against a receiver in his official capacity, it is not essential to the jurisdiction of the court over the receiver, or to the validity of the order, that the application should be based upon notice to the parties in the action wherein the receiver was appointed. It is sufficient that leave be granted by the court having control over the receiver, upon notice to him, against whom alone the cause of action exists and against whom the proceedings must be brought.[1]

§ 266. The practice of the English Court of Chancery, with reference to defending actions of ejectment brought against receivers, seems to have been to apply to the court for leave to defend. And an order of reference to a master was sometimes made, to ascertain and report whether it was for the best interests of the parties that the receiver should defend the ejectment.[2]

§ 267. With regard to the liability for costs incurred by a receiver in defense of an action, it has been held that he was not entitled to the costs of defending, when he had not first obtained leave of the court appointing him to defend.[3]

§ 268. The discharge of a receiver by order of court is no bar to an action against him by third persons claiming property of which he has taken possession; and when it is alleged that the receiver has sold such property after notice of the owner's claim thereto, the court will permit the owner to bring an action against the receiver, notwithstanding he has been discharged; especially when the claimants had no notice of the receiver's application for a discharge.[4] And the rescinding of an order appointing a receiver, without prejudice to any party or claimant, constitutes no defense to an action against him to recover property of which he had taken possession under his appointment.[5]

[1] Potter *v.* Bunnell, 20 Ohio St., 150.

[2] Anonymous, 6 Ves., 287.

[3] Conyers *v.* Crosbie, 6 Ir. Eq., 657.

[4] Miller *v.* Loeb, 64 Barb., 454.

[5] Peacock *v.* Pittsburg Locomotive and Car Works, 52 Ga., 417.

CHAPTER IX.

OF THE RECEIVER'S LIABILITIES.

§ 269. A receiver is responsible for his official acts directly to the court appointing him, and this responsibility continues until he is finally discharged.[1] This immediate

[1] Henry *v.* Kaufman, 24 Md., 1. See Conkling *v.* Butler, 4 Biss., 22.

and direct responsibility to the court, however, does not relieve him from liabilities which he may incur toward third parties, and these liabilities are generally recognized and frequently enforced by the same court which has appointed him. And when a party to the cause, who is interested in the funds in the receiver's hands, ascertains that the receiver has made improper payments or has misapplied the funds, or any portion of them, he may apply to the court for relief at any stage of the cause, and it is not necessary that he should wait until the receiver passes his accounts, and then have the improper payments disallowed.[1] As a general rule, however, a receiver can only be called to account by the court appointing him, and another court will not entertain a bill to compel him to account for the performance of his trust, since he is not the receiver of the second court, and can not be called upon to answer as such.[2] And he can only be divested of the fund entrusted to him as receiver by an order of the court appointing him, made in the action in which he was appointed.[3]

§ 270. Where property in litigation passes by order of court into the hands of a receiver, who gives a bond for the faithful execution and performance of his trust, the remedy for injury done or alleged to be done during the receiver's possession should be sought against him and his sureties, and not against the plaintiff in the action in which he was appointed. The receiver being appointed for the benefit, not of the plaintiff alone, but of all parties in interest, and being an officer of the court, he is liable for any fraud or negligence of his own whereby injury accrues to the property entrusted to him. In the absence, therefore, of any evidence of fraud or collusion on the part of the plaintiff in the action, he will not be held liable for injury to the property while in the receiver's possession.[4]

[1] DeWinton *v.* Mayor of Brecon, 28 Beav., 200.

[2] Conkling *v.* Butler, 4 Biss., 22.

[3] Galster *v.* Syracuse Savings Bank, 29 Hun, 594.

[4] Kaiser *v.* Kellar, 21 Iowa, 95. See, also, Terrell *v.* Ingersoll, 10 Lea, 77; Downs *v.* Allen, 10 Lea, 652.

§ 271. It is important to observe, that while the receiver's liability to the parties in interest, for misconduct or injury to the property entrusted to his care, is generally recognized by courts of equity, they will not ordinarily permit such liability to be enforced against him by legal proceedings, unless leave of court is first obtained for that purpose. Being the representative of the court, it will not permit him to be made a defendant without its consent having first been given. And persons desirous of enforcing demands against a receiver are, therefore, required either to apply to the court, by motion or petition, for relief against the receiver, or to ask leave of the court to institute an action against him.[1]

§ 272. A receiver will not be held personally liable, in his individual capacity, upon a covenant or instrument made by him in his official capacity, and the only remedy upon such covenant must be sought against the estate of which he was receiver. Thus, when the receiver of a banking corporation sells and assigns certain judgments in favor of the bank, and the instrument of assignment is executed strictly in his official, and not in his personal capacity, and contains a covenant that the several judgments sold are due and unpaid, no personal liability is incurred by the receiver upon such covenant, and it will be presumed, under such circumstances, that the purchaser trusted to the receiver in his official capacity.[2]

§ 273. As a rule, receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts. And receivers who have been appointed over a corporation, and who have accepted the trust and taken possession of the assets, do not thereby become liable for rent of the premises held by the company under a lease; nor can they be held liable until they elect to take possession of the premises, or

[1] See chapter VIII, subdivision V, Actions against Receivers. See, also, Ellis *v.* Little, 27 Kan., 707.

[2] Livingston *v.* Pettigrew, 7 Lans., 405.

until the doing of some act which would in law be equivalent to such an election.[1] But when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such case being the common-law liability of an assignee of a lease, and not for the debt due from the corporation. And in such case, the facts being undisputed, it is proper for the court to direct the receiver to make payment to the lessor, without a reference to determine the matter.[2]

§ 274. The question of a receiver's liability for loss of the funds entrusted to him, by reason of the misconduct of another, is one of importance, and has sometimes arisen in cases of the failure of banks having funds of receivers in their custody. The question would seem to depend upon the manner of keeping the account, and it has been held that if a receiver remits to his bank money which comes to his hands in his official capacity, to be deposited with his private account, and not to a separate account as receiver, thereby mingling the trust funds with his individual funds, he will be liable for the loss on failure of the bank.[3] So when a receiver deposits the funds of his receivership with his bankers, and receives from them for his own benefit interest upon the balances remaining on deposit, he will be held liable for any loss which may result from their bankruptcy, and will be compelled to make good such loss.[4] And a receiver will be held accountable for the loss of all funds of the receivership occasioned by the failure of a banker with whom they are deposited, if deposited in such manner as to be beyond his absolute control. For example, when a receiver, in order to induce certain persons to become his sureties, enters into an arrangement with them whereby the

[1] Commonwealth *v.* Franklin Insurance Co., 115 Mass., 278. And see this case as to what constitutes such an election.

[2] People *v.* Universal Life Insurance Co., 30 Hun, 142.

[3] Wren *v.* Kirton, 11 Ves., 377.

[4] Drever *v.* Maudesley, 13 L. J., N. S. Ch., 433; S. C., 8 Jur., 547.

funds of his receivership are to be deposited in bank in the joint names of the sureties, to be drawn therefrom upon drafts drawn by a partner of one of the sureties and signed by the receiver, and the bankers fail, thereby causing a loss to the fund, the receiver and his sureties are liable for such loss, since the receiver has parted with his exclusive control over the fund by associating with himself the authority of another person.[1]

§ 274 *a*. The question of the liability of a receiver of a bank to payment in full of moneys which had been specially deposited in or remitted to the bank, would seem to be controlled by the fact as to whether such funds were kept separate and distinct from the general funds of the bank, so as to be capable of identification, or whether they were mingled with the general funds, with no means of discriminating between them. Thus, money collected by an insolvent bank upon a draft sent to it for collection and mingled with its general funds, with no marks of distinction, can not be recovered in full against a receiver of the bank, such money being incapable of identification or of being distinguished from the funds belonging to the general creditors.[2] So when a savings bank is made, by an order of court, the depositary of the funds belonging to suitors in such court and held by its officers, such funds being received by the bank from time to time like all other deposits, and mingled with its other funds, with no means of identification, a receiver of the bank will not be required to pay such deposit in full, and it will only be entitled to share *pro rata* with other depositors and creditors. Nor, in such case, does the fact that the bank did not pay interest on such deposit, as on others, change the principle. And this is true, even though the court making the deposit is the same which appoints the receiver, it having no other or greater rights

[1] Salway *v.* Salway, 2 Russ. & M., 215, reversing S. C., 4 Russ., 60, and affirmed on appeal to the House of Lords, *sub nom.* White *v.* Baugh, 9 Bli., N. S., 181.

[2] Illinois Trust & Savings Bank *v.* Smith, 21 Blatchf., 275.

under such circumstances than those of any other creditor.[1] And since a check drawn in the ordinary form, and not describing any particular fund out of which it is payable, does not operate as an assignment of funds in the hands of the drawee, if a receiver is afterwards appointed over the drawer of the check, who takes possession of the entire fund on deposit before the check is presented, the drawee is not entitled to payment in full at the hands of the receiver, having no specific lien upon the fund.[2] And to entitle the payee of a draft drawn upon a bank, but not paid before the appointment of a receiver over the bank, to payment in full as against the receiver, the specific fund must be traced into the hands of the receiver against which the draft was drawn, or which, before the receivership, had been set apart to its payment in such manner as to constitute it a trust fund, the equitable title to which had vested in the payee of the draft. And when this does not appear, the payee can not, as against the receiver, claim priority over other creditors.[3] But since the proceeds of goods consigned to a factor to be sold on a *del credere* commission continue to be the property of the consignor so long as they may be traced and identified, they may likewise be claimed as against a receiver of the factor, who only succeeds to the factor's rights in this respect. And the proceeds of goods thus consigned having been kept distinct, the receiver may be required to apply them in payment of drafts drawn by the consignor upon the factor, which have passed into the hands of third parties.[4]

§ 275. The extent of a receiver's liability for the miscarriage or fault of another is dependent in a large degree upon whether the loss occurred through the receiver's own negligence or default, and in the preceding section it has

[1] Otis *v.* Gross, 96 Ill., 612.

[2] Attorney-General *v.* Continental Life Insurance Co., 71 N. Y., 325. See, also, Butler *v.* Sprague, 66 N. Y., 392.

[3] People *v.* Merchants & Mechanics Bank, 78 N. Y., 269.

[4] Francklyn *v.* Sprague, 10 Hun, 589.

been shown that, in cases of loss occurring by reason of his own negligence or misfeasance, the receiver will be held liable. Where, however, he has acted with evident caution and for what he deemed the best interests of the estate, and a loss occurs without fault of his own, he will not ordinarily be required to make good such loss.[1] And where a receiver collected a large sum of money due the estate, and, deeming it unsafe to remit the amount in specie, he purchased bills of exchange of a tradesman then in good credit, but who soon afterward failed, the receiver having had no knowledge of his failing circumstances, it was held that he was not personally liable for the loss.[2] So when a loss occurs through the fraud or misconduct of an attorney, as by his misappropriation of funds collected for the receiver, if the receiver used due and reasonable care in selecting such attorney, he will not be charged with the loss.[3]

§ 276. Where property is placed in a receiver's hands for an indefinite period, with a probability of remaining there for a number of years pending the litigation, and it is of such a nature that it may be profitably employed by hiring, it would seem to be the receiver's duty so to do. And if, instead of so hiring it, he employs the property in and about his own private business, he thereby receives a benefit from the trust committed to him for which he will be held accountable, and which should be charged to him in his accounts.[4] But when a receiver sells property belonging to his receivership he is only liable for the proceeds upon the basis of actual sales and receipts; and in the absence of negligence, misconduct or bad faith on his part, he is not liable for probable or speculative profits which might have been realized had he continued the management of the property.[5]

[1] Knight *v.* Plimouth, 3 Atk., 480; Union Bank Case, 37 N. J. Eq., 420, affirmed on appeal *sub nom.* Sandford *v.* Clarke, 38 N. J. Eq., 265; Powers *v.* Loughridge, 38 N. J. Eq., 396.

[2] Knight *v.* Plimouth, 3 Atk., 480.

[3] Powers *v.* Loughridge, 38 N. J. Eq., 396; Union Bank Case, 37 N. J. Eq., 420, affirmed on appeal *sub nom.* Sandford *v.* Clarke, 38 N. J. Eq., 265.

[4] Battaile *v.* Fisher, 36 Miss., 321.

[5] Demain *v.* Cassidy, 55 Miss., 320.

§ 277. When a receiver, without permission of court, and pending an injunction restraining him from so doing, forcibly takes possession of property which had been mortgaged by the defendant debtor before the receiver's appointment, and sells the same, he becomes liable therefor as a trespasser, and will be deemed as much a trespasser as the mortgagor himself would have been had he undertaken to seize and sell the property after giving the mortgage.[1]

§ 278. The liability of a receiver to the court appointing him does not terminate until his discharge. And when a defendant, whose property the receiver has taken into possession and sold by order of the court, afterward takes advantage of the insolvent laws of the state, and the receiver is appointed as his trustee in the insolvent proceedings, such appointment does not relieve him from his responsibility to the court of equity as receiver. The power of that court in such a case is regarded as ancillary to the jurisdiction of the insolvent court, and the receiver may be required by the court of equity to bring the fund into that court.[2]

§ 279. The general doctrine already considered, that receivers are liable only to the court appointing them, has been somewhat modified in Massachusetts, in the case of receivers over railways. And it is there held that, when receivers are operating a railway under appointment from a court of chancery of another state, and the courts of that state hold them liable as common carriers and they are acting in that capacity, they are liable to an action in the courts of Massachusetts, for a breach of duty as common carriers.[3] This doctrine, however, is plainly inconsistent with the weight of authority, in so far as it recognizes a right of action against receivers, without permission of the court appointing them.[4]

[1] Manning *v.* Monaghan, 1 Bosw., 459. See S. C., 23 N. Y., 539, where the right of action against the receiver as a trespasser in such case was sustained, but the case was reversed for misjoinder of parties. And see S. C., 10 Bosw., 231, when tried again in the court below.

[2] Henry *v.* Kaufman, 24 Md., 1.

[3] Paige *v.* Smith, 99 Mass., 395.

[4] See chapter VIII, subdivision V, Actions against Receivers.

§ 280. When a receiver fails to comply with an order requiring him to pay into court a balance reported to be in his hands, he is liable to be committed for disobeying the order. But the proper practice is not to grant an order for the commitment in the first instance, but to make the order in the alternative, requiring him to pay the money within a given time or to stand committed.[1] When he is in default in the payment into court of interest upon a balance due from him, and has disobeyed orders of the court for its payment, he may be punished by committal.[2] And since the receiver is an officer of the court, he need not be served with a writ of execution of a decretal order of the court, but only with a copy of the order, and if he disobeys this he is liable to be committed.[3] So the refusal of a receiver to pay over moneys in accordance with the order of the court constitutes a contempt and may be punished as such. And upon appeal by the receiver from an order adjudging him guilty of contempt for such refusal, the court will not review the propriety of the order directing such payment, since if the court below had power to make the order, and if it is not appealed from, its propriety can not be questioned upon an appeal from the order adjudging the receiver guilty of contempt.[4] Nor, in proceedings against a receiver for contempt in refusing to turn over money in accordance with the direction of the court, can he justify such refusal upon the ground that he has been garnished as to the money in question.[5] And the appropriation by a receiver to his own use of the funds in his possession, without leave of court, constitutes a gross breach of his trust, and a contempt of court which may be punished either by fine or imprisonment, or by both, at the discretion of the court. And in such case, the object of an attachment and commitment for the contempt

[1] Davies *v.* Cracraft, 14 Ves., 143.

[2] *In re* Bell's Estate, L. R., 9 Eq., 172.

[3] Anonymous, Mos., 40.

[4] Clark *v.* Bininger, 75 N. Y., 344. And see this case as to the practice upon proceedings against a receiver for contempt under the statutes of New York.

[5] People *v.* Brooks, 40 Mich., 333.

being not merely to compel the restoration of the money illegally taken by the receiver, but to punish the offense as well, the discretion of the court will not be controlled by the fact that the receiver has no present means of repaying what he has abstracted.[1] So when the appointment of a receiver is revoked and he is ordered to restore to the proper parties the property and money received by him, he may be punished for contempt if he refuses to obey such order.[2]

§ 281. Where a receiver is appointed of the effects of a partnership, but the only assets which come to his hands are notes and book accounts of the firm, it has been held that he is not liable to the landlord of the premises where the business was conducted for the rent thereof, since he was not possessed of any property on which the landlord had a right to distrain.[3]

§ 282. It has been said that if a receiver pays money to persons who prove not to be entitled thereto, although he may have acted innocently and supposed them to be entitled in right of the parties to the cause, he should be held liable to the parties in interest, on the ground that in making such payments he departs from the strict line of his duty, and is therefore liable for any error that he may commit in so doing.[4]

§ 283. Under the practice of the English Court of Chancery, in the case of a receiver over real property, it was proper for the parties to the cause to make application to the court that the owner be required to deliver possession to the receiver. And if a loss occurred because of the owner being allowed to remain in possession, it was held to be the fault of the parties in interest in the cause in not applying for such an order, rather than the fault of the receiver.[5]

§ 284. When a solicitor in a cause has improperly assumed the character of a receiver, and has acted in that

[1] Cartwright's Case, 114 Mass., 230. And see this case for the procedure in such cases.

[2] People *v.* Jones, 33 Mich., 303.

[3] *In re* Brown, 3 Edw. Ch., 384.

[4] McCan *v.* O'Ferrall, West H. L., 593.

[5] Griffith *v.* Griffith, 2 Ves., 400.

capacity without having been appointed, thereby leading the parties in interest to believe that he had been duly appointed as receiver, he will be held liable for any loss in the collection of the rents which may occur through his negligence.[1]

§ 285. It would seem that the liability of a receiver may sometimes be extended to his administrator. For example, when the administrator of a deceased receiver submits to an accounting as to rents which came to the receiver's hands during his life-time, the court may order him to pay over the amount which appears to be due.[2]

§ 286. It is to be observed, as regards the receiver's accountability to the court from which he derives his appointment, that the dismissal of the bill upon which he was appointed does not have the effect of releasing him in any manner; and being an officer of the court, he is subject to its orders in relation to the fund or effects placed in his hands, until he is finally discharged by the court.[3] But when the funds of the receivership have been regularly distributed under the orders of the court among the creditors of the estate whose claims have been duly proven, the receiver is not liable in an action for further demands or claims made by other creditors.[4] And an order appointing a receiver in a cause in which the court has full jurisdiction, affords protection to the receiver for all acts done under and in conformity with such order, even though it is afterward reversed for error. An action can not, therefore, be maintained against a receiver to recover rents collected and paid over by him as receiver out of real estate of a judgment debtor, the court having full jurisdiction of the matter, even though the appointment is subsequently reversed upon the ground that the property in question was exempt from execution, and therefore not subject to the appointment of a receiver.[5]

[1] Wood *v.* Wood, 4 Russ., 558.
[2] Magan *v.* Fallon, 5 Ir. Eq., 490.
[3] State *v.* Gibson, 21 Ark., 140.
[4] Keene *v.* Gaehle, 56 Md., 343.
[5] Holcombe *v.* Johnson, 27 Minn., 353.

CHAPTER X.

OF RECEIVERS OVER CORPORATIONS.

I. PRINCIPLES GOVERNING THE JURISDICTION.

§ 287. In most of the states of this country, as well as in England, the jurisdiction of courts of equity over corporations has been extended by legislative enactments to the appointing of receivers and sequestrating the property of the corporation, in proper cases; and in some of the states the jurisdiction has even been enlarged by statute to the extent of winding up the affairs of the corporation, and to the forfeiture of its franchise. While these legislative enactments vary largely in the different states, their general purpose and scope are to provide a more effectual method for the protection of creditors and shareholders than can be had by the ordinary process of courts of law. And while in the decisions of the courts under these various statutes, there is sometimes manifested a lack of harmony and uniformity, certain well-defined principles have yet been established which serve as precedents for future guidance, and the discussion of these will occupy the present chapter.

§ 288. It is to be observed, at the outset, that the general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. And courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequestrate the effects of the corporation, or take the management of its affairs from the hands of its own officers and entrust it to the control of a receiver of the court, upon the application either of creditors or shareholders.[1] And while equity may properly compel officers of corporations to account for any breach of trust in their official capacity, yet in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation, upon a bill filed by a stockholder alleging fraud, mismanagement and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity, in such cases, ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers, and although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers, and placing them in the hands of a receiver.[2]

[1] Bangs *v.* McIntosh, 23 Barb., 591; Howe *v.* Deuel, 43 Barb., 504; Waterbury *v.* Merchants Union Express Co., 50 Barb., 157; Belmont *v.* Erie R. Co., 52 Barb., 637; Neall *v.* Hill, 16 Cal., 145; French Bank Case, 53 Cal., 495. See, also, Baker *v.* Administrator of Backus, 32 Ill., 79; Pond *v.* F. & L. R. Co., 130 Mass., 194. But see Blatchford *v.* Ross, 54 Barb., 42; S. C., 5 Ab. Pr., N. S., 434, 37 How. Pr., 110; Adler *v.* Milwaukee Patent Brick Manufacturing Co., 13 Wis., 57.

[2] Waterbury *v.* Merchants Union Express Co., 50 Barb., 157; Neall *v.* Hill, 16 Cal., 145; Howe *v.* Deuel, 43 Barb., 504; Belmont *v.* Erie R.

§ 289. Where the jurisdiction of courts of equity has been extended by legislation to the appointment of receivers over incorporated companies, the power thus conferred is treated by the courts as a delegated authority, the exercise of which requires the most careful consideration. The effect of appointing a receiver being to take the property of the corporation out of the control of its own officers, to whom it has been entrusted by its stockholders, the courts proceed with extreme caution in the exercise of so summary a power.[1] And, in construing such statutes, they are inclined to give them a strict construction, and require the prescribed method of obtaining jurisdiction of the person and of the subject-matter to be strictly followed. Thus,

Co., 52 Barb., 637. Waterbury *v.* Merchants Union Express Co., 50 Barb., 157, was an action brought by a stockholder of the defendant corporation, against the company and its executive or managing committee, to obtain a dissolution of the corporation and the appointment of a receiver for winding up its affairs. Barnard, J., denying the motion for a receiver, observes, p. 166: "The remaining grounds for the relief which the plaintiff demands resolve themselves into the alleged personal misconduct of the executive or managing committee. This has, I think, nothing to do with the present motion for a receiver. The infidelity or misconduct of some, or even of all, of the trustees or managers of such an association, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management and placing it in the hands of an officer of the court. In such a case, the principles of remedial or preventive justice go no further than to enjoin or forbid the misconduct, or remove the unfaithful officer. I am not aware of any authority for dissolving a corporation, or an unincorporated stock association, or for taking its management from its proprietors or shareholders, on the mere ground that one, or even all, of its trustees, are unfaithful. The court may enjoin the trustee, or suspend and remove him, and if necessary may order a new election, but can not substitute its own officer." But in Blatchford *v.* Ross, 54 Barb., 42; S. C., 5 Ab. Pr., N. S., 434, 37 How. Pr., 110, the court inclined to the opinion that the action of the executive committee of a corporation in repeatedly voting to themselves large sums of money in addition to their regular compensation, for their services as promoters or originators of the company, was sufficient ground for appointing a receiver in behalf of stockholders, but a decision as to the appointment was reserved on other grounds.

[1] Oakley *v.* Paterson Bank, 1 Green Ch., 173.

where a statute authorizes the court, upon application of any judgment creditor of a corporation, after execution returned unsatisfied, to sequestrate the property, stock and choses in action of the corporation, and to appoint a receiver, the statute will be strictly construed, since the exercise of the jurisdiction which it confers involves the virtual dissolution of the corporate body, and the loss of its franchises.[1] And when the statute authorizes the court to interfere upon the petition of the person obtaining such judgment, the court can not acquire jurisdiction by any other means than a petition by the judgment creditor himself, and a petition by his attorney will not suffice.[2] And it by no means follows, because an injunction has been granted against the operations of the corporate body, that a receiver should necessarily be appointed, since the two questions are independent of and distinct from each other, and circumstances may call for and demand a suspension of the business of the corporation, while its officers in charge are not implicated, and are the most proper persons to wind up its affairs.[3]

§ 290. Since the appointment of a receiver over a corporation is generally equivalent to a suspension of its corporate functions, and of all authority over its property and effects, and is also equivalent to an injunction restraining its agents and officers from intermeddling with its property, the courts will not exercise this extraordinary power when the corporate body, as such, is not made a party to the action, and is not before the court.[4] And this is true, even when the bill is filed against the stockholders of the company, assailing the franchise itself, and asserting that the company is not a corporation proper, but a mere partnership. The object of such a proceeding being to take away the corporate franchise, the corporation itself must be made

[1] Bangs *v.* McIntosh, 23 Barb., 591.

[2] Bangs *v.* McIntosh, 23 Barb., 591.

[3] Oakley *v.* Paterson Bank, 1 Green Ch., 173.

[4] Gravenstine's Appeal, 49 Pa. St., 310; Baker *v.* Administrator of Backus, 32 Ill., 79.

a party defendant to enable it to be heard; and, being an indispensable party to the proceedings, the omission to join it is not a mere formal error, but one of substance, which may be taken advantage of by the stockholders on writ of error.[1]

§ 291. Notwithstanding the corporation over which a receiver is sought is itself an indispensable party to the suit, as above shown, yet when a receiver has already been appointed, he need not be joined as a party to subsequent proceedings having for their object the appointment of a receiver over the same corporation. Thus, upon a bill filed against a banking association by one of its creditors, charging that defendants are only a nominal or pretended corporation, having fraudulently combined to deceive their creditors, and being only a voluntary association in the nature of a partnership, it is not necessary to join as a party defendant a receiver of the bank appointed upon proceedings instituted by another creditor. Nor is such a bill demurrable because it prays the appointment of a receiver, since, whether a receiver be or be not necessary, the objection because of the prayer for his appointment can not sustain a demurrer.[2]

§ 292. It has already been shown that courts of equity proceed with extreme caution in the appointment of receivers over corporate bodies, under legislative enactments enlarging their general jurisdiction for this purpose.[3] And in proceedings under such statutes, mere general allegations in the affidavits in support of the motion for a receiver, as to the belief of affiants that great frauds have been committed, are not sufficient ground for the interference, when it is not stated in what the frauds consist, or by whom they were committed.[4] Nor is there any necessity for appointing a receiver when no fraud is alleged or shown, and when no

[1] Baker *v.* Administrator of Backus, 32 Ill., 79.

[2] Wheeler *v.* Clinton Canal Bank, Harring. (Mich.), 449.

[3] See § 289, *ante*.

[4] Oakley *v.* Paterson Bank, 1 Green Ch., 173.

satisfactory proof is produced that the court should interfere to save the property from material injury, or to rescue it from impending destruction.[1] If, however, the corporation is insolvent and its directors have been guilty of fraudulent mismanagement of its affairs, and if it has ceased to transact the business for which it was incorporated, its financial embarrassments being such as to render it impracticable to resume, a fit case is presented for a receiver, in order to preserve the property of the corporation for the benefit of its creditors and stockholders.[2]

§ 293. In New York, the jurisdiction over corporations conferred by statute upon courts of equity powers is sufficient to authorize the appointing of a receiver, when it is apparent that the corporation has ceased to act as such, and when the president and principal shareholders have assumed to use the corporate property as their own, and the president has been guilty of a breach of trust in making an assignment of such property.[3] So when it is apparent to the court that the corporation against which the proceedings are instituted is without any office or place of business, that it has no officers to attend to its affairs and no person authorized to take charge of and manage its business, it is proper to appoint a receiver, upon a bill by a stockholder, to preserve the effects of the company for the benefit of the stockholders generally.[4] And when a banking association has issued notes, which are unauthorized and expressly prohibited by the banking laws of the state, and has secured these notes by a deed of trust of certain securities, upon a bill to set aside such trust deed the court may appoint a receiver *in limine*, to take charge of the securities assigned until the final determination of the cause upon its merits.[5] So in an action brought by creditors of a pretended bank-

[1] Baker *v.* Administrator of Backus, 32 Ill., 79.

[2] Coal & Mining Co. *v.* Edwards, 103 Ill., 472.

[3] Conro *v.* Gray, 4 How. Pr., 166.

[4] Lawrence *v.* Greenwich Fire Insurance Co., 1 Paige, 587.

[5] Leavitt *v.* Yates, 4 Edw. Ch., 173, 175.

ing corporation averring that the bank was never incorporated, but transacted business under a corporate name under the management of its principal promoter, its supposed assets being in fact his, and averring his death and that his representative is wasting his assets, the bill seeking to set aside certain judgments and to recover the assets and for an accounting, a proper case is presented for the appointment of a receiver *pendente lite*.[1]

§ 294. While receivers are thus allowed under the New York practice, for the protection of shareholders in certain classes of cases, the courts proceed with much caution in the exercise of the jurisdiction. And in an action brought by a shareholder for the purpose of canceling certain shares of stock, alleged to have been illegally issued by the corporation, and to restrain the holders of such shares from assigning or encumbering them, the appointment of a receiver of the shares in controversy is unauthorized and improper, upon an *ex parte* application, before answer, and when it is not shown that defendants are irresponsible, or that there is any danger of loss from the transfer of the stock.[2] Nor is a former shareholder entitled to a receiver as against trustees or officers of the corporation, upon the ground of a mismanagement of their trust, when he has sold and parted with his entire interest in the corporation and in its effects.[3]

§ 295. It is also to be observed, with reference to this species of relief when sought in behalf of shareholders of a corporation, that the acquiescence or consent of a shareholder for a long period of years in any given state of facts or conduct on the part of the corporate authorities, which he afterward seeks to make the foundation for the appointment of a receiver, will generally prove a bar to the relief sought.[4] For example, when the authorities of a corpora-

[1] Dobson *v.* Simonton, 78 N. C., 63.

[2] People *v.* Albany & Susquehanna R. Co., 7 Ab. Pr., N. S., 290.

[3] Smith *v.* Wells, 20 How. Pr., 158.

[4] Gray *v.* Chaplin, 2 Russ., 126; Hager *v.* Stevens, 2 Halst. Ch., 374.

tion have made an agreement in the nature of a lease, for letting the tolls of the company for a longer period than they are authorized to do under the act of incorporation, but such agreement is acquiesced in by the shareholders for a period of forty-seven years without objection or complaint, during which time the lessee and his successors have remained in undisturbed possession and receipt of the tolls, equity will not appoint a receiver of the rents and tolls *in limine*, in an action by a shareholder to set aside the agreement or lease.[1] So when a shareholder files a bill for a receiver to take charge of certain real estate in another state, alleged to have been purchased with the funds of the corporation and the title taken in the name of another person, when the situation of the title has remained unchanged for a number of years, during all which time the plaintiff has been a shareholder, and no greater danger is shown to the title than has existed during all this period, and it is not shown that the person holding the legal title is insolvent, no sufficient cause is presented for the extraordinary aid of the court by a receiver. Especially will the court be justified in refusing to interfere in such case, when it is apparent from the bill that the property over which the receiver is sought was accumulated by fraud, of which the plaintiff shareholder was himself cognizant.[2] And a shareholder seeking a receiver over a corporation, upon the ground of misconduct or breach of trust on the part of its officers, must himself be free from participation in such misconduct.[3]

§ 296. The propriety of the relief as against corporations is sometimes determined by the legislation or decisions of other states, in which the association was incorporated, upon the matter urged as a ground for a receiver. Thus, in an action brought by holders of the original stock of a corporation created by and under the laws of other states, to set aside a new issue of stock made by the corporation,

[1] Gray *v.* Chaplin, 2 Russ., 126.

[2] Hager *v.* Stevens, 2 Halst. Ch., 374.

[3] Hyde Park Gas Co. *v.* Kerber, 5 Bradw., 132.

it is not proper to grant an injunction against the action of the corporate officers and to appoint a receiver of the new issue, when the states in which the company was incorporated have, by legislative action and by the decision of a court of last resort, ratified the acts of the corporation in issuing the new stock, and have declared it to be legal.[1]

§ 297. Where the statutes of a state authorize and provide for appointing receivers in proceedings against corporations whose charters have expired, the courts being vested with full jurisdiction in equity for that purpose, and being fully empowered by statute to make all orders necessary for the enforcement of the trust, and the statute requiring the receiver to divide the fund collected among the creditors *pro rata*, the remedy thus provided is regarded, in effect, as a method of sequestration for the benefit of all the creditors of the corporation. In such case, attaching creditors of the property of the corporation can not acquire valid liens, so as to prevent the receivers from selling the property and applying the proceeds in payment of all the creditors. And the mode of sequestration thus afforded by the statute will be held to take effect as against attaching creditors, even though they may have attached before the receivers were actually appointed, but after the filing of the bill and the issuing of an injunction restraining the corporation from further conducting its affairs.[2] But when a corporation becomes extinct by virtue of an act of legislature, its assets and powers being transferred to a new corporation, the courts are powerless, upon an *ex parte* application, to appoint a receiver over the former corporation, it having ceased to exist, and there being no person competent to represent it, the new corporation not being made a party to the action.[3]

[1] O'Brien *v.* Chicago, Rock Island & Pacific R. Co., 53 Barb., 568.

[2] Atlas Bank *v.* Nahant Bank, 23 Pick., 480.

[3] Young *v.* Rollins, 85 N. C., 485. As to the right to a receiver over an insurance company under the laws of New Jersey, when the company has ceased to do business, see Streit *v.* Citizens Fire Insurance Co., 29 N. J. Eq., 21.

§ 298. The right of judgment creditors of a corporation to a sequestration of the corporate effects and to a receiver, in aid of their judgments at law after execution returned unsatisfied, is a right which is given by statute in many if not in most of the states; and it may be regarded as an extension or enlargement of the general jurisdiction of courts of equity, which, as already shown, does not extend to sequestrating the property and winding up the business of the corporation.[1] It is inconsistent with the purpose and scope of this work to attempt any discussion of these various statutes, and it is believed that each practitioner is sufficiently familiar with the legislation and practice of his own state to render any such discussion unnecessary in the present treatise. And it will be sufficient, for the purposes of the present work, to present the principles deduced from the decisions in the various states, without attempting to discuss or to analyze the statutes, which are undergoing constant modification and change.

§ 299. It is held in Wisconsin, that a creditor of a corporation who has established his demand by judgment at law, may, after execution returned unsatisfied in whole or in part, file a bill in behalf of himself and such other creditors of the corporation as may elect to become parties thereto, against both the corporation and its delinquent or withdrawing shareholders, upon which he may have a decree for an account of the assets and liabilities of the corporation, and a receiver. And the officers and shareholders will be required to pay in and account to the receiver for so much of the capital stock as will be sufficient to pay plaintiff's judgment, and the debts of such other creditors as may choose to come in under the decree. In such case, the maxim of the law that "equality is equity" applies, and the creditors must all share alike in the funds realized, in proportion to the amount of their respective claims.[2]

[1] See § 288, *ante*, and cases cited.

[2] Adler *v.* Milwaukee Patent Brick Manufacturing Co., 13 Wis., 57. The jurisdiction of equity, in this class of cases, is said by Dixon, C. J., delivering the opin-

§ 300. The question of the extent to which equity will interfere with the tolls and franchise of a corporation, such as a bridge company, in aid of judgment creditors, where the chief value consists in such tolls or franchise, is not altogether free from difficulty. But it is held by the Supreme Court of the United States, that where the rents and profits of the company for a given period are sold under execution, and purchased by the judgment creditor, he, with other judgment creditors, may, upon a bill in equity, have a receiver to collect the tolls and pay them into court, to the end of discharging the judgment indebtedness. And the relief is extended, in such case, upon the ground of the inadequacy of the remedy at law and the difficulty of obtaining complete satisfaction of the judgments without the aid of equity.[1]

ion, to exist at common law and independent of statutory authority, "as a sort of distinct exercise of equitable jurisprudence." As regards the remedy against delinquent shareholders, the statement is doubtless true. But the assertion that the jurisdiction of equity by sequestrating the property of the corporation, and appointing a receiver to wind up its concerns, exists at common law and independent of statute is certainly unsupported by the weight of authority, as already shown. See § 288, *ante*, and cases cited. Nor does the assertion of this doctrine seem to have been necessary to the decision of the case, as regards the appointment of a receiver, since the power of appointment in this class of cases was expressly conferred by statute.

[1] Covington Drawbridge Co. *v.* Shepherd, 21 How., 112. In this case, the corporation was created by act of legislature of the state of Indiana, and built a drawbridge over the Wabash river in that state, pursuant to its charter. Judgments were had against the corporation in the United States circuit court for the district of Indiana, under which execution was levied upon the bridge as real property, and the marshal sold the rents and profits of the bridge under the execution for the term of one year, the execution creditor becoming the purchaser. He, with other judgment creditors, then filed a bill in the United States circuit court and obtained a decree appointing a receiver, with directions to take possession of the bridge, receive its tolls and pay them into court, to be applied in satisfaction of the judgments *pro rata*. Upon appeal, the decree was sustained, the court, Catron, J., using the following language, p. 124: . . "By the laws of Indiana, lands and tenements can not be sold under execution until the rents and

§ 301. In New York, it is held that a creditor at large, *i. e.*, before judgment, of a manufacturing corporation, is not entitled to a receiver in an action brought by him for a dissolution of the corporation and a sequestration of its effects, upon the ground of insolvency and suffering other creditors to obtain a preference.[1] And it may be stated as a general proposition, founded upon established principles of equity, that a creditor of a corporation is not entitled to the extraordinary aid of equity in the enforcement of his demand, when he can obtain full and adequate relief at law. Where, therefore, proceedings are instituted by a creditor of a banking corporation for the appointment of a receiver to wind up its affairs, but it is apparent from his bill that

profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation (owning no corporate property but this bridge), unless equity can afford relief. . . All that we are called on to decide in this case is that the court below had power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls and pay them into court, to the end of discharging the judgments at law; and our opinion is that the power to do so exists, and that it was properly exercised. It is, therefore, ordered that the decree below be affirmed, and the circuit court is directed to proceed to execute its decree."

[1] Galwey *v.* United States Steam Sugar Refining Co., 13 Ab. Pr., 211. As to the power of the courts of New York, under a statute of the state, to appoint a receiver over a corporation which had been dissolved, upon the ground of delay on the part of the trustees appointed to wind up its affairs, see *In re* Pontius, 26 Hun, 232.

whatever rights he may have are cognizable at law, and may be remedied by following the mode pointed out by law for that purpose, the application for a receiver will be denied, and the creditor will be left to pursue his legal remedy.[1]

§ 302. As regards the effect of appointing a receiver over a corporation, upon the lien previously acquired by a judgment creditor, the rule in Indiana is, that the appointment does not operate to divest or affect the judgment lien. And where a judgment creditor can enforce his judgment in the ordinary way, by levy upon and sale of the real estate of the corporation on which his judgment is a lien, the court may properly refuse to grant an order upon the receiver to pay the judgment out of moneys in his hands, when it is not shown that such moneys are the proceeds of a sale of the property upon which the judgment was a lien.[2] A somewhat similar doctrine prevails in Michigan, and it is there held that a receivership of a corporation *pendente lite*, and before a final decree of forfeiture, is merely conditional and inchoate, the right of the receiver being only a possessory right for the purposes of the suit. His appointment, therefore, does not divest the title of the corporation to its real estate, and when no assignment of such title is ever made by the corporation to the receiver, who afterwards becomes *functus officio*, the real estate of the corporation is subject to the lien of a judgment and execution, as if there had never been a receiver.[3] And the appointment of the receiver does not of itself have the effect of dissolving or terminating the existence of the corporation.[4]

§ 303. While, as is thus seen, the appointment of a receiver *pendente lite*, and before final dissolution of the corporation, does not have the effect of divesting the title to

[1] Parmly *v.* Tenth Ward Bank, 3 Edw. Ch., 395.

[2] Southern Bank of Kentucky *v.* Ohio Insurance Co., 22 Ind., 181.

[3] Montgomery *v.* Merrill, 18 Mich., 338.

[4] Moseby *v.* Burrow, 52 Tex., 396; Pringle *v.* Woolworth, 90 N. Y., 502.

its real property, a different effect results from the appointment when made upon final dissolution of the corporate body. At the common law, upon the dissolution or civil death of a corporation, all its real property remaining unsold at the time of such dissolution reverted to the original grantors or to their heirs, the reversion being a condition annexed by law and resulting from the failure of the cause for which the grant was made.[1] The common-law rule, however, is now almost entirely obsolete, and in this country the disposition to be made of the corporate property upon dissolution is usually regulated by legislative enactments, having for their object the protection of creditors and shareholders. And the general tendency of the legislation and judicial decisions upon this subject is to regard all the property of a corporation, upon its dissolution, as a trust fund pledged to the payment of the demands of creditors and shareholders.[2] Thus, in New York, the common-law rule, that upon dissolution of the corporate body the title to its realty reverts to the original proprietors or grantors, or to their heirs, is entirely obsolete, and under the laws of that state, the title to all the property, real or personal, vests in the receiver of the corporation appointed upon its dissolution, for the benefit of the creditors and shareholders.[3]

§ 304. Where creditors of a corporation have a charge upon a particular fund in the nature of a trust fund, for the satisfaction of their demands, the mismanagement and waste of such fund by the corporate officers entrusted with its control may warrant the court in appointing a receiver for the preservation of the property *pendente lite*. For example, upon a bill filed by persons insured in an insurance and loan association, against the directors and managers, showing gross mismanagement upon the part of defendants, and that a large portion of the trust funds out of which the assured were to be paid had been lost by the negligence of defend-

1 Angell & Ames on Corporations, § 779, and cases cited.

2 Angell & Ames on Corporations, § 779 *a*.

3 Owen *v*. Smith, 31 Barb., 641.

ants, and it appearing that the secretary of the association had absconded with a large amount of its funds, and that there was great danger of the remainder being wasted, the case was regarded as a plain one for an injunction and a receiver. And the aid of equity, in such a case, is founded upon the necessity of interfering to prevent waste of the funds in question, and also upon the breach of trust of the defendants charged with the management of the trust fund.[1]

[1] Evans *v.* Coventry, 5 DeG., M. & G., 911, reversing S. C., 3 Drew., 75. The motion for an injunction and receiver having been refused by the Vice-Chancellor, his decision was reversed by the lords justices on appeal, and a receiver and injunction were allowed. The grounds upon which the interference was based were stated by Lord Justice Knight Bruce, as follows, p. 916: . . "The application before the court is founded on the common right of persons who are interested in property which is in danger to apply for its protection. Upon the bill and answer it appears that the plaintiffs are interested in the funds of that which was an association, under whatsoever circumstances of honesty or dishonesty constituted or carried on, but the affairs of which have ceased to be, and probably can never again be, in a state of activity. It was intimately connected with another society, or alleged society, of a subsidiary nature. The defendants are persons, or include persons, who owed duties to those represented by the plaintiffs in respect of the funds of the society, for the purpose of care and protection. Those duties appear to have been abandoned in a manner deserving, as it would at present appear, the strongest observation. This has led to a grievous loss, which has been sustained by persons of small means and in humble circumstances, who are ill able to bear it. These same defendants have now under their control, or in their power, a poor remnant of the property which they have so ill cared for. Whatever may be the specific allegations or want of specific allegations in the bill, the true and necessary result of the entire pleadings as they stand is, that this remnant of property is in danger. In my judgment, the objections which have been argued against this application, at the existing stage of the cause, might be urged with as much reason, as much force, and as much effect, if this were an application to restrain the felling of timber or the destruction of a house. It is a case of waste, partly perpetrated and obviously imminent. But for the judgment which has been given, and for which I feel the most unaffected respect, I should have said, from my experience of the practice of the court in Lord Eldon's time, that this was a plain case for that injunction, and that receiver, which I think ought now to be granted." And Lord Justice Turner adds: "Whatever else may be said of this motion, it

So the insolvency of a life insurance company and its assignment of all its property to a trustee for its creditors, without the authority of its stockholders, being an abandonment of the franchises of the company, constitute sufficient ground for a receiver in behalf of creditors.[1]

§ 305. Under the New York code of procedure, courts of equity jurisdiction are empowered to appoint receivers over the effects of foreign corporations, upon the application of judgment creditors, and are fully authorized to take charge of the property of such corporations in order to preserve it for the benefit of creditors and shareholders.[2] And when a creditor of a foreign corporation has obtained judgment against the company in the state where it is incorporated, and in aid of his judgment has procured the appointment of a sequestrator of the property of the corporation in that state, but the defendant transfers its property and assets to a new corporation in New York, upon no other consideration than shares of stock in the new company, the judgment creditor may enforce his judgment

can not be said that any argument has been omitted which could be urged against it. What the court has to look at is the position of the parties on the record. According to the allegation of the bill, verified by affidavit or admitted by the answer, the plaintiffs are in the position of parties who have a charge on the funds of what I may for the present purpose call the original association. The defendants are in the position of trustees of the association. It appears that funds of that association have been lost by the act of the treasurer, whose conduct it was the duty of the other defendants to superintend. *Prima facie*, therefore, there appears a clear case for the interference of the court; for I certainly can not accede to Mr. Selwyn's argument, that a breach of trust is not a sufficient ground for the interference of the court by the appointment of a receiver. Whether the plaintiffs will ultimately establish the commission of a breach of trust is not the question now before the court. It is admitted that funds have been lost, of which it was the duty of the defendants to take care. That loss is *prima facie* evidence of a breach of the duty of the defendants, sufficient to authorize the interference of the court by the appointment of a receiver."

[1] Buck *v.* Piedmont & Arlington Life Insurance Co., 4 Fed. Rep., 849; S. C., 4 Hughes, 415.

[2] DeBemer *v.* Drew, 57 Barb., 438; Murray *v.* Vanderbilt, 39 Barb., 140.

against the new company in New York, and may have a receiver in aid of such proceedings.[1] But when an association, incorporated in a foreign country, has been dissolved by a decree or order of the government of that country, but the decree of dissolution is not absolute and still leaves the corporation in existence for certain specified purposes, and it has property within the limits of this country under control of its officers resident here, the courts of this country will not appoint a receiver of the assets here, upon grounds which would not have availed for that purpose in the foreign country.[2]

§ 306. It is held in New York, that when a corporation is created in another state and is in process of voluntary dissolution there, but a portion of its assets are in New York, in possession of some of its officers resident there and subject to the jurisdiction of the New York courts, and not amenable to the courts of the state under whose laws the corporation was created and exists, upon a bill by stockholders in New York for an account and distribution, the court may appoint a receiver when it is shown that the corporate officers in New York are insolvent, and that the funds are in jeopardy. Under such circumstances, the courts of New York, having undoubted jurisdiction over the officers of the corporation resident in that state, as well as the property there located, may properly interfere to preserve a fund which is endangered by the insolvency or improper conduct of defendants.[3]

[1] Barclay *v.* Quicksilver Mining Co., 9 Ab. Pr., N. S., 283. See, also, S. C., 6 Lans., 25.

[2] Hamilton *v.* Accessory Transit Co., 26 Barb., 46. And see Murray *v.* Vanderbilt, 39 Barb., 140.

[3] Redmond *v.* Hoge, 3 Hun, 171. The grounds of the jurisdiction, in such a case, are very clearly set forth by Davis, P. J., as follows, p. 175: "The whole scope and story of this action may be stated almost in a sentence. The officers who have complete control of a foreign corporation, now in process of voluntary dissolution, being all residents of this city and having in their possession here certain funds of the corporation, which their own insolvency has put in jeopardy, and neither they nor the funds being amenable to the jurisdiction of the state under whose laws the corporation was created

§ 307. It is also held, under the code of procedure in New York, upon proceedings by the attorney-general in the nature of a *quo warranto*, for the dissolution of a corporation and the forfeiture of its franchises, that the court has no power to appoint a receiver before judgment of forfeit-

and exists, refuse to make application of such funds to the creditors and stockholders in conformity to the proceedings for dissolution, or to put the same in a place of safety. They possess, being all the executive and a majority of the administrative officers of the corporation, such power of control, that no suit can be commenced by the corporation itself to protect the fund. Is a court of equity of the state powerless, at the suit of a minority of the officers who are stockholders and personally interested in the application and distribution of the fund, to appoint a receivership of the particular fund, and apply it, first, to the creditors of the corporation, and secondly, to the stockholders, in accordance with the proceedings for dissolution in the home state of the corporation? We have clearly jurisdiction of the persons of the officers in the state. We have jurisdiction of the property because it is within our territory. The plaintiffs are also citizens of our state and show themselves to be remediless both in Connecticut and in the federal courts. We are not prepared to say, until some higher tribunal shall admonish us to the contrary, that this court has not, under such circumstances, power to intervene, so far as relates to the property actually within the state. The court is not powerless, in such a case, to enforce any judgment it may render, so long as it is limited to the particular fund which it finds here and takes from the hands of persons over whom its jurisdiction is complete and puts it into the safe-keeping of its own officers; and we are aware of no authority which denies to us jurisdiction in a case containing all the elements of that before us. It is idle to answer that the courts of Connecticut have jurisdiction over the corporation; for such jurisdiction, so far as it affects the questions and remedies here, is futile. Its impotency was illustrated in the proceeding commenced in the superior court of that state in which Eaton was appointed receiver, and in which he was forced, in substance, to report that all the assets of the corporation were detained in the city of New York, and that 'he never has had, nor permitted to have, possession of any of the assets of the said corporation.' A receiver, if appointed there, must resort to our courts to reach the appellants and the fund in their hands, by an action similar to the present, and become substantially the receiver of this court, in order to acquire possession of the fund. But while no such officer exists in Connecticut, there seems to us no sound reason why the jurisdiction of this court may not be invoked to preserve a fund now in the hands of persons in our jurisdiction and in danger of being lost by their insolvency or improper use."

ure, although an injunction may properly issue to prevent the corporation from doing any illegal act, or from disposing of its funds.[1]

§ 308. In the case of a corporation transacting a large business and where large interests are involved, upon application for a receiver in behalf of a judgment creditor seeking the enforcement of his judgment against the corporation, the court may give the defendant an opportunity of preventing the interference of a receiver by giving security in lieu thereof. And for this purpose, a reasonable time may be allowed the defendant corporation, within which to file a bond with sufficient sureties, to secure the plaintiff in any recovery which may be had in his action.[2] And although the facts may not warrant a receiver in behalf of mortgage bondholders of a corporation, as of a canal company, the court may yet retain the cause for the purpose of requiring the company to render accounts from time to time of its receipts and disbursements, for the information and protection of such bondholders.[3]

§ 309. When an action has been instituted by a corporation against one of its shareholders, to recover the amount of his unpaid subscription to the capital stock of the company, it constitutes no defense to such action, that a receiver is afterward appointed over the corporation, and the action will not be defeated because of such appointment; especially when the receiver has taken no steps to possess himself of the cause of action, or to collect the amount due from defendant.[4]

§ 310. Where certain shares of stock in an incorporated company are in the hands of its receiver, the certificates having been duly issued to him, and the certificates are entitled to be registered by the registering agent of the

[1] People *v.* Washington Ice Co., 18 Ab. Pr., 382.

[2] Barclay *v.* Quicksilver Mining Co., 9 Ab. Pr., N. S., 283.

[3] Stewart *v.* Chesapeake & Ohio Canal Co., 5 Fed. Rep., 149; S. C., 4 Hughes, 47.

[4] Glenville Woolen Co. *v.* Ripley, 43 N. Y., 206.

company, and to be certified as representing shares duly registered, such registration being a valuable privilege appurtenant to the shares, one who prevents them from being so registered, and who converts the privilege to his own use, by procuring it to be conferred upon an equal number of shares of his own stock, may be compelled by the court to make good the stock in the hands of the receiver by restoring such privilege.[1]

§ 311. It has been held in England, in a case where the defendant, holding a fellowship in a college corporation, had assigned the profits thereof to the plaintiff, that the latter could not have a receiver of the dividends and moneys due from such fellowship.[2]

§ 312. The principles governing courts of equity in the selection of receivers over corporations are sufficiently treated elsewhere in this volume.[3] It may be here observed, however, that the receiver of a corporation need not necessarily be an individual person, and a corporate body may itself be appointed receiver of another corporation upon the insolvency of the latter.[4]

§ 312 *a*. When a receiver is appointed over a corporation, with the usual powers of receivers, and specially empowered by the order of the court to receive all the effects and choses in action of the corporation, such order involves a correlative duty upon the part of the corporate officers to deliver the assets to the receiver, even though such delivery is not specifically directed by the court. A failure, therefore, by the officers of the corporation to deliver its assets to the receiver, and their sale by such officers, constitute a contempt of court and will be punished as such.[5]

[1] Erie R. Co. *v.* Heath, 8 Blatchf., 536.

[2] Berkeley *v.* Kings College, 10 Beav., 602.

[3] See chapter III, *ante.*

[4] *In re* Knickerbocker Bank, 19 Barb., 602. And see as to considerations governing the court in selecting a receiver of a large banking corporation, whose assets are of great value, *In re* Empire City Bank, 10 How. Pr., 498.

[5] Young *v.* Rollins, 90 N. C., 125.

II. Functions Duties and Rights of Action of the Receiver.

§ 313. Want of harmony in the decisions.
314. Receiver of insolvent corporation a trustee for creditors and shareholders.
315. Receiver represents the corporation, for purposes of litigation.
315 *a*. May purchase at mortgage sale; may prosecute or defend suits.
316. Succeeds to all rights of action of the corporation; trover for conversion of note; suit on note for policy of insurance; suit for money due, or improperly disposed of.
317. Rights of action of receiver of insolvent bank.
317 *a*. Right to enforce individual or additional liability of stockholders.
318. Appointment does not change rights of action or contract relations; same defenses allowed; mutual insurance company; change of corporate name.
319. Receiver can not disaffirm settlement made by corporation; can not sue on canceled note of insurance company.
320. May disaffirm act of corporation in fraud of creditors; illegal transfer of securities; fraudulent disposal of money and notes; illegal mortgage; fraudulent transfers.
321. Right of action to recover illegal dividends declared by insolvent corporation.
322. When powers derived wholly from statute.
323. Presumption as to receiver's right to divide assets among creditors.
324. Receiver's right of action to recover of shareholders unpaid subscriptions to capital stock.
324 *a*. Defenses to such actions; transfer of shares.
325. Shareholder can not enjoin receiver from collecting unpaid subscription; defense of fraud not admissible when all parties participated.
326. Receivers of mutual insurance companies may recover assessments due on premium notes.
327. What receiver must allege to maintain this class of actions.
328. Liability of makers of premium notes not increased by appointment of receiver; assessment must be alleged and proven.
329. Receiver takes place of directors in making assessment, subject to sanction of court.
330. Acts in a ministerial and not a judicial capacity; may re-assess for unpaid balances.
331. When may assess all notes; what proof required as to losses.
332. Receiver may allow equitable claims for losses.

§ 313. It has already been shown, that in most of the states of this country, the general jurisdiction of courts of equity over corporations has been enlarged, to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders. The general purpose of these legislative enactments has been to provide adequate protection, in case of insolvency of the corporate body or of misconduct on the part of its officers, to those who might otherwise be without remedy in the usual course of proceedings at law. The question of the *status* or relation occupied by receivers thus appointed, and of their duties and functions, is one of much importance; and while a want of harmony is sometimes apparent in the decisions upon these points, it is believed that they are generally susceptible of being harmonized, and that they are not inconsistent with the established principles of equity.

§ 314. As regards the relation occupied by the receiver of an insolvent corporation towards the parties in interest, the better doctrine undoubtedly is that he stands as the representative, both of the creditors of the corporation and of

its shareholders. He is not, therefore, the agent or representative of the corporation exclusively, but is to be regarded rather as a trustee for both creditors and shareholders.[1] Thus, under the laws of New York authorizing the appointment of a receiver of the effects of a corporation, upon the application of a judgment creditor after return of execution unsatisfied, it is held that the receiver, by virtue of his appointment, becomes a trustee, not only for the creditor on whose application he was appointed, but for all other creditors of the corporation, and also a trustee for the shareholders, in which capacity he is as much bound to guard and subserve their interests as those of the creditors.[2]

§ 315. While the receiver of an insolvent corporation is thus treated as the representative of both creditors and shareholders, as far as any beneficial interest is concerned, yet, for the purposes of determining the nature and extent of his title, he is regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it. For purposes of litigation, therefore, he takes only the rights of the corporation, such as could be asserted in its own name, and upon that basis only can he litigate for the benefit of either share-

[1] Gillet *v.* Moody, 3 N. Y., 479; Talmage *v.* Pell, 7 N. Y., 347; Libby *v.* Rosekrans, 55 Barb., 217; Alexander *v.* Relfe, 74 Mo., 495. But see Atchison *v.* Davidson, 2 Pin. (Wis.), 48. See, as to functions and powers of a receiver of a moneyed corporation under the statutes of New York, appointed in behalf of a judgment creditor, after execution returned unsatisfied, Angell *v.* Silsbury, 19 How. Pr., 48. And see, as to functions of a receiver over an insolvent banking corporation, under the laws of Ohio, Lafayette Bank *v.* Buckingham, 12 Ohio St., 419; State *v.* Claypool, 13 Ohio St., 14.

[2] Libby *v.* Rosekrans, 55 Barb., 217, 220. But see Atchison *v.* Davidson, 2 Pin. (Wis.), 48, where it is held that receivers of corporations are appointed for the benefit of creditors, with power and authority to collect and pay over to them the assets. The choses in action of the corporation, it is held, are in the possession of the receivers for the creditors, and are to all intents and purposes the property of the creditors, the receivers holding the property and assets of the corporation in trust for the creditors, as the agents of the court.

holders or creditors, except when acts have been done in fraud of the rights of the latter, but which are valid as against the corporation itself, in which case he holds adversely to the corporation.[1] And as regards the nature of the defense which he may interpose in an action brought against him in his official capacity, it would seem that he stands in no better position than the corporation would have done, and is to this extent its representative. Thus, when the laws of the state prohibit a corporation from interposing

[1] Curtis *v.* Leavitt, 15 N. Y., 44; Alexander *v.* Relfe, 74 Mo., 495. The doctrine of the text is well stated by Mr. Justice Comstock, in Curtis *v.* Leavitt, 15 N. Y., 44, as follows: "The appellant, as receiver (of an insolvent banking corporation), has no interest in or power over the property affected by the trusts in question, except such as he derives under the statutes which have been mentioned. It has been said in this, as in other cases, that he represents the creditors and the stockholders, but for all the purposes of inquiring into this title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders; but this only proves that they are the beneficiaries of the funds in his hands, without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties, in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence, solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to. It has, however, been uniformly assumed, and was not denied on the argument, that he succeeds to the rights of creditors, and takes his title under them, where conveyances have been made in fraud of their rights, but otherwise valid. In such cases, he held adversely to the debtor corporation. For all the purposes of the present controversy, I shall proceed upon this assumption. In general, then, a receiver of this description takes merely the rights of the corporation, such as could be asserted in its own name, and on that basis only can he litigate for the benefit of either stockholders or creditors, except when acts have been done in fraud of the rights of the latter, but valid as to the corporation itself."

the defense of usury to any action brought against it, it would seem that the receiver is affected by the prohibition to the same extent as the corporation itself would have been.[1]

§ 315 *a*. Since the receiver succeeds to the title and rights of action of the corporation itself, he may purchase property at a mortgage sale in satisfaction of a debt due to the corporation, having the same powers in this regard that the corporation might have exercised.[2] And a receiver appointed over a corporation, under the statutes of North Carolina, for the purpose of winding up its affairs, may prosecute an action to recover its property after the corporation has ceased to exist by reason of the expiration of its charter.[3] So a receiver of an insolvent insurance company, under the laws of Pennsylvania, being empowered by statute to defend suits in the name of the corporation or otherwise, and to do all other acts necessary to the settlement of its affairs, may be substituted in an action of attachment which had been begun against the corporation prior to his appointment.[4] But, under the New York code of procedure, when a receiver of a corporation has brought an action against its directors to recover for their neglect of duty, the stockholders have no such ownership of, or interest in, the cause of action as to entitle them to be admitted as a matter of right as parties plaintiff with the receiver.[5]

§ 316. As regards the rights of action vested in the receiver of a corporation by virtue of his appointment, the general rule is that he takes all rights of action which the corporation itself originally had, and may enforce them by the same legal remedies.[6] He may, therefore, maintain

[1] Curtis *v.* Leavitt, 15 N. Y., 85, 86, per Comstock, J.

[2] Jacobs *v.* Turpin, 83 Ill., 424.

[3] Asheville Division No. 15 *v.* Aston, 92 N. C., 578.

[4] Pickersgill *v.* Myers, 99 Pa. St., 602.

[5] Kimball *v.* Ives, 30 Hun, 568.

[6] Brouwer *v.* Hill, 1 Sandf., 629; White *v.* Haight, 16 N. Y., 310; Osgood *v.* Laytin, 48 Barb., 464. And see Shaughnessy *v.* The Rensselear Insurance Co., 21 Barb., 605; Stark *v.* Burke, 5 La. An., 740; New Orleans Gas Light Co. *v.* Bennett, 6 La. An., 457; Gas Light & Banking Co.

an action of trover to recover the value of a promissory note due to the corporation and converted by defendant, the right of action accruing before his appointment.[1] So he may maintain an action of trover for the wrongful conversion of property of the corporation.[2] And the receiver of an insolvent corporation is entitled to enforce all the securities belonging to the corporation for the purpose of paying its debts. A receiver of an insolvent insurance company may, therefore, maintain an action to collect a note given for a policy of insurance by the assured.[3] And in New York, receivers of insolvent corporations are held to be fully authorized, both by statute and by virtue of their general powers, to sue for all money due to the corporation, and for all property improperly disposed of in violation of either the rights of creditors or of shareholders, for the purpose of paying the debts of the corporation, and dividing the surplus, if any, among the shareholders.[4]

§ 317. The same general doctrine prevails in Rhode Island, where it is held that the receiver of an insolvent banking corporation, appointed under a statute authorizing the proceeding, is clothed with all the powers and rights of the corporation itself, with respect to the collection of its debts and the enforcement of obligations in its favor. His principal duty being to protect the creditors of the bank, he may take advantage of any fraud in derogation of the rights of creditors to which the insolvent corporation was a party, and may maintain an action to recover money of which the corporation has been defrauded. Where, therefore, an officer of the bank, in breach of his trust, has wrongfully appropriated funds of the bank to his own use, the receiver may maintain an action for money had and re-

v. Haynes, 7 La. An., 114; Hyde v. Lynde, 4 N. Y., 387.

[1] Brouwer v. Hill, 1 Sandf., 629.

[2] Terry v. Bamberger, 14 Blatchf., 234.

[3] White v. Haight, 16 N. Y., 310.

[4] Osgood v. Laytin, 48 Barb., 464. And see, as to right of action of the receiver of an insolvent insurance company under the laws of New York, upon premium notes due the company, Lawrence v. McCready, 6 Bosw., 329; Berry v. Brett, id., 627.

ceived against such officer. And in such action, it is not necessary that the receiver, as a condition precedent to his recovery, should prove a special injury resulting from the wrong complained of to some creditor or shareholder of the bank. Nor need the receiver, in order to entitle him to a recovery, tender to the defendant his shares of capital stock in the bank, which he had parted with in consideration of the securities for the conversion of which the action is brought.[1]

§ 317 *a*. The authorities are not wholly reconcilable as to the right of a receiver of a corporation to maintain an action in behalf of its creditors, to recover of shareholders an individual or additional liability, imposed by charter or statute upon shareholders for the protection of creditors. Regarding the receiver as limited to such rights of action as might have been enforced by the corporation itself, under a bank charter making stockholders liable for double the amount of their stock, it has been held that a receiver of the bank could not enforce such liability, since it is construed to exist in favor of the creditors and not of the corporation.[2] So when stockholders are made liable by statute to the creditors of the corporation, to an amount equal to their stock, for all debts and contracts made until the whole amount of capital stock is paid in, the liability being regarded as neither in favor of the corporation itself, nor of all its creditors, but only for the benefit of such creditors as fall within the prescribed conditions, the receiver can not maintain an action to enforce such liability.[3] And when by the charter of a bank, its shareholders are made severally and individually liable, to the amount of their stock, to depositors, the right of action is construed as being conferred directly upon the depositors, and it can not, therefore, be enforced by the receiver.[4] But under a statute making all persons composing the corporation liable to the extent of

[1] Hayes *v.* Kenyon, 7 R. I., 136.

[2] Jacobson *v.* Allen, 20 Blatchf., 525.

[3] Farnsworth *v.* Wood, 91 N. Y., 308.

[4] Wincock *v.* Turpin, 96 Ill., 135.

their respective shares of stock, for all debts due at the time of the dissolution of the corporation, a receiver appointed in an action brought in behalf of all creditors to wind up the corporation, may enforce such liability against the shareholders.[1] And when the additional stock liability is created by charter in favor of a certain class of creditors as an entirety, an action may be maintained by some of such creditors in behalf of all, the receiver proceeding concurrently with them by petition in the same proceeding, to enforce such stock liability in equity for the benefit of the entire body of creditors interested therein. And in such action, the court may enjoin individual creditors from pursuing their separate actions at law to enforce such liability for their own benefit.[2]

§ 318. It follows necessarily from the principles already discussed and illustrated, that the appointment of a receiver over a corporation does not have the effect of changing any rights of action, or of changing the contract relations existing between the corporation and its debtors.[3] No question of right, as between these parties, being affected by the appointment, any defense which the debtor might have urged in an action brought against him by the corporation itself, may still be made in an action brought against him by the receiver.[4] And in the case of a mutual insurance company,

[1] Story *v.* Furman, 25 N. Y., 214. See, also, McDonald *v.* Ross-Lewin, 29 Hun, 87.

[2] Eames *v.* Doris, 102 Ill., 350.

[3] Williams *v.* Babcock, 25 Barb., 109; Bell *v.* Shibley, 33 Barb., 610. And see Shaughnessy *v.* The Rensselaer Insurance Co., 21 Barb., 605; Savage *v.* Medbury, 19 N. Y., 32.

[4] Moise *v.* Chapman, 24 Ga., 249; Devendorf *v.* Beardsley, 23 Barb., 656. In the latter case, Mr. Justice James observes, p. 659, as follows: "The plaintiff, as receiver of the American Mutual Insurance Company, takes its notes and assets subject to all the conditions and legal disabilities with which they were trammeled in the hands of the corporation itself; he can not impeach or disaffirm its authorized acts, nor the authorized acts of its agents. If a note in the hands of the corporation was void, or incapable of enforcement, by reason of fraud or illegality in its procurement or inception, passing it into the hands of a receiver does not purge it of these defects."

where the obligation of the assured upon a premium note given for a policy of insurance depends upon an assessment and notice thereof, which assessment and notice have never been given by the company, so that it could maintain no action against the maker of the note, a receiver of the company stands in the same situation, and will not be allowed to maintain an action, without having taken the necessary steps to fix the liability of the defendant.[1] And when a receiver of an insolvent corporation brings an action upon a note as part of the corporate assets, but the note is by its terms made payable to the order of a differently named corporation, a change of the corporate name having been effected, it is necessary for the receiver to show, by proper averments, that the note is part of the assets of the corporation over which he has been appointed.[2] Nor can the receiver be permitted to litigate questions which have already been determined adversely to the corporation. He can not, therefore, enjoin the collection of a tax assessed against the corporation which has already been determined to be valid in an action brought in behalf of the corporation, the receiver being as much concluded by such former litigation as the corporation itself.[3] And, in an action to enforce against the receiver, a judgment previously obtained against the corporation, the receiver can not contest the amount of the indebtedness, or reopen questions which were litigated in the former action, or interpose any defense to the merits which might then have been interposed. It is, however, still reserved for the court appointing the receiver to determine the respective priorities among creditors as to payment out of the fund in the receiver's hands.[4]

§ 319. Since the receiver of a corporation, as we have already seen, succeeds to the estate of and derives his title from the corporation, he is bound by all its lawful and au-

[1] Williams v. Babcock, 25 Barb., 109; Thomas v. Whallon, 31 Barb., 172.

[2] Hyatt v. McMahon, 25 Barb., 457.

[3] Hopkins v. Taylor, 87 Ill., 436.

[4] Pringle v. Woolworth, 90 N. Y., 502.

thorized acts done before the receivership, and will not be allowed to disaffirm or set them aside. As to all such matters, he stands in precisely the same position as the corporation itself stood before his appointment; and he can not avoid a settlement which the corporation was duly authorized to make, and which was effected before his appointment. Where, therefore, an insurance company has surrendered and canceled a note given for insurance, upon the assured surrendering his policy, and no fraud upon the creditors of the company is shown, a receiver subsequently appointed will not be allowed to maintain an action upon the note, since he can have no greater rights for this purpose than the company itself had.[1]

§ 320. Where, however, the act of the corporation which it is sought to disaffirm is illegal and in violation of the rights of creditors, a different rule prevails. And in such case, the receiver, being regarded for all beneficial interests connected with the receivership as the representative of the creditors and stockholders, will not be concluded by such act.[2] Where, therefore, the directors of a corporation have made an illegal transfer of certain securities, forming a part of the corporate assets, to one of the shareholders in exchange for his stock, the transfer impairing the security of creditors and being void as to them, a receiver of the corporation subsequently appointed may maintain an action to set aside such transfer. Indeed, such an action is regarded as the most appropriate course on the part of the receiver to compel the restoration of the securities, for the benefit of

[1] Hyde *v.* Lynde, 4 N. Y., 387. Bronson, C. J., observes, p. 392: "He (the receiver) is as much bound by a settlement which the company was authorized to make, as was the company itself. It would be strange, indeed, if the legal acts of a corporation did not bind the receiver of its effects. If the rule were not so, no one would dare venture to deal with a corporation."

[2] Gillet *v.* Moody, 3 N. Y., 479; Tuckerman *v.* Brown, 33 N. Y., 297; Brouwer *v.* Appleby, 1 Sandf., 158; Brouwer *v.* Hill, 1 Sandf., 629; Attorney-General *v.* Guardian Mutual Life Insurance Co., 77 N. Y., 272.

all the creditors.[1] So when the president of a banking corporation has put into the bank fictitious notes, and has used them in lieu of the like amount of money of the bank, and has fraudulently disposed of the money, a receiver of the bank may maintain an action against the president for the recovery of the money. And in such case, the possession of the notes by the receiver will be regarded as presumptive evidence that the money has not been repaid, and as sufficient cause of action on his part.[2] So when a banking corporation, while in a condition of insolvency, acting through its cashier, has made an illegal and unauthorized transfer of certain notes held by the bank, to one of its directors who knew of its insolvency, a receiver subsequently appointed to wind up the affairs of the bank may, as the representative of the creditors, repudiate the transfer and maintain an action to recover back the value of the notes, or the amount realized on them by the defendant. And in such an action, the defendant will not be allowed, by way of counter-claim, the amount which he has actually paid for the notes, since such defense arises out of his own illegal conduct.[3] So in New York, a receiver of an insolvent corporation may maintain an action to set aside a mortgage executed by the corporation without the assent of the requisite number of its shareholders, as required by its charter.[4] So, too, he may maintain an action to set aside fraudulent agreements and transfers of its property made by the corporation, being to this extent regarded as the representative of creditors. And the court by which the receiver is appointed, having jurisdiction of the proceedings for winding up the corporation, may, upon application of the receiver, enjoin creditors from prosecuting like actions, even though begun prior to the receiver's appointment. In such a case, the decree dissolving the corporation and appointing the receiver being regarded as in the nature of

[1] Gillet *v.* Moody, 3 N. Y., 479.

[2] Butterworth *v.* O'Brien, 24 How. Pr., 438.

[3] Gillet *v.* Phillips, 13 N. Y., 114.

[4] Vail *v.* Hamilton, 85 N. Y., 453, affirming S. C., 20 Hun, 355.

a judgment for all the creditors, they are subject to the summary jurisdiction of the court in matters pertaining to the administration of the estate. It is proper, therefore, to enjoin them from proceeding with their actions, upon petition or motion by the receiver in the cause in which he was appointed, without bringing a new suit for this purpose.[1]

§ 321. The right of action of a receiver of an insolvent corporation, to recover back dividends which have been improperly paid, may be based upon the principles which have been discussed in the preceding section. And where the law of the state, regulating the incorporation of insurance companies, provides that no dividend shall be made by any company incorporated under the act when its capital stock is impaired, or when the making of such dividend will have the effect of impairing the capital stock, a dividend paid to shareholders of the corporation, while it was in a condition of insolvency, may be recovered back by its receivers. In such case, the shareholders being made liable by statute to the creditors of the corporation to the extent of such illegal dividends, the action to enforce this liability is properly brought by the receivers, who are, to this extent and for this purpose, regarded as trustees for the benefit of all the creditors.[2] And in such case, it is the duty of the court to

[1] Attorney-General *v.* Guardian Mutual Life Insurance Co., 77 N. Y., 272.

[2] Osgood *v.* Laytin, 3 Keyes, 521, affirming S. C., 48 Barb., 464; Osgood *v.* Ogden, 4 Keyes, 70. But see, *contra*, Butterworth *v.* O'Brien, 24 How. Pr., 438, where it was held that the right of action to recover such dividends was in the creditors themselves. Osgood *v.* Laytin, 3 Keyes, 521, in which the doctrine of the text was very clearly enunciated, was an action by receivers of an insolvent insurance company to recover illegal dividends paid to shareholders, and to enjoin certain creditors of the corporation, who were made defendants, from prosecuting similar actions. The statute under which the company was incorporated provided that no dividend should ever be made when the capital stock was impaired, or when the effect of such dividend would be to impair it, and that any shareholder receiving such a dividend should be individually liable to the creditors of the corporation to the extent of the dividend received. Judgment for plaintiffs on demurrer, from which defendants appealed. The court of appeals affirmed the judgment, Grover, J.,

protect the shareholders from being harassed by other actions instituted for the same purpose by individual credit-

for the court, holding as follows, p. 523: "The design, plainly expressed by the language of the section, was to prohibit a dividend of the capital among the stockholders, but to preserve the same intact as a fund for the payment of creditors and the security of dealers. It follows that the dividend in the present case was illegal, and that the stockholders receiving the same are liable to the creditors for the amount by them respectively received. The next question is, how is this to be recovered from the stockholders? Their liability is to the creditors of the company. It is clear that no one creditor of the company can maintain an action against an individual stockholder, for the reason that the liability created by statute is to the creditors generally, and not to individual creditors, thus creating a liability to the creditors jointly. Again, a creditor, if permitted individually to sue the separate stockholders, might institute actions against each, although his demand amounted to far less than the aggregate liability, and he would continue a creditor until he had obtained satisfaction of his debt, and could obtain judgment in all the actions. Again, in equity, this liability inures to the creditors in proportion to the amount of their debts respectively. The maxim, that equality among creditors is equity, is applicable to the case. A court of law can not, in a joint action by all the creditors, work out this equity and do justice between the parties. This confers jurisdiction in equity, upon the ground that there is no adequate remedy at law. The plaintiffs, as receivers, are trustees for all the creditors, and the appropriate parties to prosecute in their behalf, thus avoiding the troublesome inquiry as to who are creditors in the proceeding to collect from the stockholders the several amounts each is liable to pay. All the stockholders who are liable may and should be included as defendants in the same action. There is no difficulty in determining the amount each is to pay, upon the trial of the cause; and in case the whole amount of the liability is not required for the payment of the debts of the company, the precise amount each is to pay can be determined in the action. This course of proceeding is also necessary to prevent multiplicity of actions, as there are several hundreds of stockholders. The above views dispose of the case as to the stockholders. The creditors insist that they are not proper parties to the action against the stockholders, and that, upon this ground, they are entitled to judgment upon the demurrer. Equity having the power to enforce payment from the stockholders, and an action having been instituted in the proper mode for that purpose, which, in its result, will place the fund in the possession of the court for distribution among the creditors, it is the duty of the court to protect the stockholders from being harassed

ors of the corporation, and it may therefore enjoin such creditors from prosecuting their actions.[1]

§ 322. Where receivers over corporations are appointed under a statute which regulates their functions and prescribes their powers and duties, it is held that they derive their powers wholly from the statute under which they are appointed, and have no other authority than such as is thus conferred. But to warrant them in the exercise of a power, it need not be expressly conferred, and if it can be fairly implied, either from the general scope and purpose of the statute, or as an incident to a power expressly given, there is sufficient warrant for its exercise.[2]

§ 323. It is held in Wisconsin, that in a collateral action, in the absence of any proof as to the authority of receivers of a corporation to dispose of its assets, they are fully empowered to dispose of and divide them among the creditors. Where, therefore, receivers of a banking corporation transfer to a third person a negotiable note, part of the assets of the bank, in payment and satisfaction of a demand held by him against the bank, in an action upon such note, the court will indulge the presumption that the receivers have properly discharged their duties; and, in the absence of any proof of fraud, the legal title to the note will be held to have passed by the action of the receivers to the assignee, so that he may recover upon it against the makers.[3]

§ 324. Under the laws and practice of many of the states, the right of action to recover of shareholders the amounts due upon their subscriptions to the capital stock of a corporation, vests in the receiver appointed in behalf of the creditors, upon the insolvency of the company. Thus,

by other actions instituted to enforce the same liability. This can only be done by restraining such actions. To enable the court effectually to do this, those creditors who have instituted such suits, and those who threaten so to do, are proper parties to the action. The judgment appealed from should be affirmed."

[1] Osgood *v.* Laytin, 3 Keyes, 521.

[2] Runyon *v.* Farmers & Mechanics Bank of New Brunswick, 3 Green Ch., 480.

[3] Atchison *v.* Davidson, 2 Pin. (Wis.), 48.

in New York, receivers of insolvent corporations are vested with this power, and may maintain actions to recover of delinquent stockholders their unpaid subscriptions,[1] and to enjoin the creditors of the corporation from proceeding with separate actions for the recovery of their individual demands.[2] And it was formerly held in New York, that such actions must be instituted against the shareholders individually, and that they can not be maintained against them collectively;[3] but the later doctrine recognizes the right of the receiver to bring the action against all shareholders collectively, or to sue them individually.[4] So in Rhode Island, receivers of mutual insurance companies are authorized by law to make assessments upon the shareholders for paying the indebtedness of the corporation.[5] And in Louisiana, on the appointment of a receiver over a corporation upon its insolvency, the right of action against delinquent shareholders for arrearages of their subscriptions to the capital stock, for the purpose of paying the debts of the corporation, is distinctly recognized as being in the hands of the receiver and not in the corporation or its individual members.[6] And it would seem that the remedy of creditors, in this class of cases, is to apply to the court for an order on the receiver to make calls upon the stockholders for the purpose of meeting the indebtedness of the corporation.[7] So in Maryland, a receiver under a statute for the dissolution of corporations may maintain an action to recover a balance due from a shareholder upon his unpaid subscription.[8] And the right of the receiver to enforce

[1] Pentz *v.* Hawley, 1 Barb. Ch., 122; Farmers & Mechanics Bank *v.* Jenks, 7 Met., 592; Calkins *v.* Atkinson, 2 Lans., 12; Rankine *v.* Elliott, 16 N. Y., 377.

[2] Calkins *v.* Atkinson, 2 Lans., 12; Rankine *v.* Elliott, 16 N. Y., 377.

[3] Calkins *v.* Atkinson, 2 Lans., 12.

[4] Van Wagenen *v.* Clark, 22 Hun, 497.

[5] Tobey *v.* Russell, 9 R. I., 58.

[6] Stark *v.* Burke, 5 La. An., 740; New Orleans Gas Light Co. *v.* Bennett, 6 La. An., 457; Gas Light & Banking Co. *v.* Haynes, 7 La. An., 114.

[7] New Orleans Gas Light Co. *v.* Bennett, 6 La. An., 457.

[8] Stillman *v.* Dougherty, 44 Md., 380; Frank *v.* Morrison, 58 Md., 423.

such subscriptions by actions against the shareholders is also recognized in Ohio[1] and in Iowa.[2] But in New York, a receiver of a corporation appointed on a creditors' bill, and vested with only the ordinary powers of receivers in creditors' suits, can not maintain a bill in equity to enforce an unpaid balance due from a shareholder upon his subscription.[3] Nor can a receiver of an insolvent manufacturing corporation, in New York, recover unpaid subscriptions when the corporation itself could not have maintained the action.[4] But if an action for the recovery of unpaid subscriptions has been brought by the corporation before the appointment of a receiver, it may be continued in the name of the original plaintiff for the benefit of the receiver.[5]

§ 324 *a*. No errors which may have been committed by the court in appointing the receiver, or in directing and controlling his action, can avail in defense of a suit by the receiver to enforce unpaid subscriptions to capital stock; nor do the fraudulent acts of the receiver, or of the officers of the corporation, constitute a defense.[6] Nor can the stockholder defend such action upon any ground which questions the action of the court in appointing the receiver and in ordering the assessment, such as fraud in procuring the receiver, or that the corporation is not indebted, or that the action is prosecuted to harass the defendant, and all such defenses should be interposed in the proceeding in which the receiver is appointed and the assessment ordered.[7] To conclude a stockholder by a proceeding under the Illinois statute to wind up an insolvent corporation and to recover unpaid subscriptions, when a receiver appointed in such proceeding sues for the subscription, the stockholder should

[1] Clarke *v.* Thomas, 34 Ohio St., 46.

[2] Stewart *v.* Lay, 45 Iowa, 604.

[3] Mann *v.* Pentz, 3 N. Y., 415.

[4] Billings *v.* Robinson, 28 Hun, 122.

[5] Phœnix Warehousing Co. *v.* Badger, 67 N. Y., 294.

[6] Stewart *v.* Lay, 45 Iowa, 604. And see this case for a general discussion of the defenses which may and may not be interposed in such an action.

[7] Schoonover *v.* Hinckley, 48 Iowa, 82.

have been made a party to the original proceeding, and the receiver should show his appointment by a decree which is conclusive against the defendant.[1] But the fact that the entire capital stock had not been subscribed is no bar to the action, if the defendant, with knowledge of that fact, participated in the affairs of the company in a manner which could only be justified upon the assumption that the subscribers intended to proceed with the capital stock only partially subscribed.[2] So in an action by a receiver to recover unpaid subscriptions to capital stock, the fact that the defendant acted as a director of the corporation estops him from denying its corporate existence, and from asserting that the amount of capital stock required to be paid in full in cash had not been paid, and that he subscribed upon the faith of representations that it had been fully paid, which representations were false.[3] But when a shareholder transfers his shares in good faith before the appointment of the receiver, all assessments thereon having been fully paid to the time of such transfer, and it not appearing that any of the present creditors of the corporation were creditors at the time of such sale, such shareholder is not liable to the receiver for the balance of the subscription.[4]

§ 325. Where a statute, authorizing the appointment of receivers to wind up the affairs of insolvent corporations, makes it the receiver's duty to collect from the shareholders of the corporation the sums remaining due on account of their unpaid subscriptions, and a receiver, in the performance of this duty, has obtained a decree against a shareholder for the payment of the balance due from him, such shareholder is not entitled to an injunction to restrain the

[1] Chandler *v.* Brown, 77 Ill., 333; S. C., 8 Chicago Legal News, 123. The decree was also held objectionable in that it assumed to confer upon the receiver discretionary powers to compromise with stockholders as to payment of subscriptions, since each stockholder had a vested right in the contract for subscription of every other stockholder.

[2] Stillman *v.* Dougherty, 44 Md., 380.

[3] Ruggles *v.* Brock, 6 Hun, 164.

[4] Billings *v.* Robinson, 28 Hun, 122.

receiver from collecting the amount until all the debts of the corporation can be ascertained, and the amount due from each shareholder be determined. Any equity which such shareholder might rely upon as the foundation for an injunction should have been urged in defense of the action brought by the receiver, and can not avail the shareholder after a decree against him in that action.[1] And when a receiver is appointed to close up the affairs of an insolvent banking corporation for the benefit of its creditors, in an action brought by him upon a note given by a stockholder for his subscription to the capital stock of the bank, it constitutes no defense to the action that the note was given without consideration, and in aid of an illegal and fraudulent transaction, when all the parties participated in the fraud.[2]

§ 326. Under the practice prevailing in the states of New York and Indiana, receivers of insolvent mutual insurance companies are empowered to recover assessments due upon premium notes held by such companies for the purpose of adjusting losses and settling the indebtedness of the corporations. In New York, the power of the receiver to thus assess the premium notes is derived wholly from statute, as will be seen by an examination of the authorities in that state.[3] In Indiana, however, it is held, even in the absence of any statute conferring such authority upon the receiver of a mutual insurance company, that he is authorized to make assessments upon the premium notes due to the company, for the purpose of meeting its obligations. The authority to make the assessments is implied from the necessity of making them, since without such power it would not be

[1] Pentz *v.* Hawley, 1 Barb. Ch., 122.

[2] Farmers & Mechanics Bank *v.* Jenks, 7 Met., 592.

[3] Shaughnessy *v.* The Rensselaer Insurance Co., 21 Barb., 605; Williams *v.* Babcock, 25 Barb., 109; Thomas *v.* Whallon, 31 Barb., 172; Sands *v.* Sweet, 44 Barb., 108; Bangs *v.* Gray, 12 N. Y., 477, reversing S. C., 15 Barb., 264; Sands *v.* Sanders, 28 N. Y., 416; Jackson *v.* Roberts, 31 N. Y., 304; Lawrence *v.* McCready, 6 Bosw., 329; Berry *v.* Brett, id., 627. See, also, McDonald *v.* Ross-Lewin, 29 Hun, 87.

possible for the receiver to manage and adjust the affairs of the corporation.[1] In both these states, the receiver is regarded, for the purpose of making such assessments, as standing in the position and succeeding to the powers of the directors of the corporation.[2] And the receiver, being empowered in the state of his appointment to institute and defend all suits in the name of the corporation, or otherwise, may sue in another state to recover assessments upon premium notes, no creditor in the latter state having interfered to prevent the prosecution of the suit, or to assert any claim to its proceeds.[3] But where the statute authorizing the directors to levy such assessments upon premium notes, limits the power to cases where it is necessary for the payment of "just claims on the corporation," and it is apparent that neither the receiver, nor the court appointing him and to which he reported his action, and from which he obtained an order to make the assessment, has examined or passed upon the validity of the claims or demands against the corporation for which the assessment was made, the receiver can not maintain an action to collect such assessment upon a premium note.[4]

§ 327. The rule in Indiana, as to the pleadings required in actions brought by receivers of insolvent insurance companies to recover assessments upon premium notes, is that all the facts necessary to show a liability upon the note must be pleaded by the receiver. For, while the court appointing him may properly pass upon the question of the propriety or necessity of a receiver, it can not in that proceeding settle the question of the liability of the maker of a premium note to pay, either in whole or in part.[5] And

[1] Embree *v.* Shideler, 36 Ind., 423, sustained in Tippecanoe Township *v.* Manlove, 39 Ind., 249.

[2] Thomas *v.* Whallon, 31 Barb., 172; Embree *v.* Shideler, 36 Ind., 423.

[3] Lycoming Insurance Co. *v.* Wright, 55 Vt., 526.

[4] Embree *v.* Shideler, 36 Ind., 423; Downs *v.* Hammond, 47 Ind., 131.

[5] Manlove *v.* Burger, 38 Ind., 211. See, also, Embree *v.* Shideler, 36 Ind., 423, sustained in Tippecanoe Township *v.* Manlove, 39 Ind., 249; Manlove *v.* Naw, 39 Ind., 289.

the receiver must, therefore, allege and prove that the court has examined and determined the validity of the demands, for the payment of which the assessment is made.[1] But it is not necessary that he should present with his pleadings a transcript of the decree of the court by which he was appointed receiver of the company, and by which the assessment was made upon the premium notes, since the evidence of his right of action, though essential to a recovery, is not the foundation of the action, and rests only in averment.[2]

§ 328. In New York, the doctrine is well established, in the class of cases under consideration, that the liability of the members of mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company, and vested with their rights and powers and nothing more.[3] The liability of the makers of the premium notes being contingent upon certain conditions, such as loss by the company, assessment upon the notes and notice to the makers, such contingent or conditional liability is not changed into an absolute one by the insolvency of the company and appointment of a receiver; since the courts can not change the terms of the agreement, nor make that an absolute promise which was before a conditional one. And the appointment of the receiver merely clothes him with the power, under the statutes, of determining the amount of indebtedness due upon the notes by proceeding to make the necessary assessments, and by taking such other steps as are required by law to fix the liability of the makers of the notes, the appointment itself in no manner fixing such liability.[4] The statutes, therefore, requiring an assessment

[1] Downs *v.* Hammond, 47 Ind., 131.

[2] Boland *v.* Whitman, 33 Ind., 64.

[3] Shaughnessy *v.* The Rensselaer Insurance Co., 21 Barb., 605; Williams *v.* Babcock, 25 Barb., 109; Savage *v.* Medbury, 19 N. Y., 32. And see Devendorf *v.* Beardsley, 23 Barb., 656.

[4] Williams *v.* Babcock, 25 Barb., 109.

in order to fix the liability of makers of the premium notes, an assessment by the receiver is an indispensable condition to his right of action.[1] And such an assessment and apportionment of losses by the receiver, being a condition precedent to his recovery upon the notes, must be pleaded in the action and proved upon the trial.[2] Where, therefore, the complaint of the receiver contained no averment as to the liabilities of the company, and therefore laid no foundation for the introduction of evidence upon that point, and there was no proof of the existence of any liabilities for the payment of which an assessment was necessary, the receiver was held not entitled to recover.[3]

§ 329. It is also the doctrine of the New York courts, in this class of cases, that the receiver takes the place of the directors in ascertaining the amount of demands against the insurance company, and in determining the necessity for an assessment, as well as its amount, with this limitation upon his authority, that he can not act without the sanction of the court. The court, however, does not make the assessment, the receiver being himself the actor for that purpose, and his authority depending, not upon the order of the court, but upon the existence of the facts rendering an assessment necessary and proper. The requirement of the sanction and approval of the court is an additional restriction and limitation upon the receiver's authority, but does not dispense with the other and more important conditions. The court, therefore, neither adjudicates upon the liability of the company, nor the amount for which assessments shall

[1] Shaughnessy *v.* The Rensselaer Insurance Co., 21 Barb., 605. See, also, Williams *v.* Babcock, 25 Barb., 109.

[2] Devendorf *v.* Beardsley, 23 Barb., 656; Thomas *v.* Whallon, 31 Barb., 172. And see, as to degree of particularity required of the receiver in making the assessment and giving notice, as a condition precedent to his right of action, Bangs *v.* McIntosh, 23 Barb., 591; Sands *v.* Sanders, 28 N. Y., 416; Jackson *v.* Roberts, 31 N. Y., 304.

[3] Thomas *v.* Whallon, 31 Barb., 172.

be made, nor the ratio of assessment, but merely sanctions the acts of the receiver in doing these things.[1]

§ 330. In thus making assessments upon the makers of premium notes under the laws of New York, the receiver acts under the statute in a ministerial and not in a judicial capacity.[2] And his action being ministerial in distinction from judicial, the fact that a former receiver has made an assessment upon the same notes, which still remains unenforced, will not prevent his successor from making a new assessment for the same purposes, since it is merely repeating the performance of a condition precedent to a right of action upon the notes by the receiver, and is by no means a judicial determination of the matter.[3] Nor is the approval of the assessment by the court regarded as a judicial decision, or as conclusive upon the maker of the note as to the particulars of the assessment, in an action brought by the receiver upon the note; such approval by the court only serving to place the act of the receiver in making the assessment, in the same position as the act of the directors, had the assessment been made by them.[4] And the receiver, in levying assessments upon such notes, may properly include as a portion of the amount to be raised an unpaid balance of former assessments, which ought to have been paid by delinquent members, but which, owing to the inability or insolvency of such members, have not been paid.[5]

§ 331. As regards the form of the assessment made by a receiver in this class of cases in New York, it is held that when he is satisfied from the liabilities of the company, and from an examination of all classes of its notes, that there

[1] Thomas *v.* Whallon, 31 Barb., 172. See, also, McDonald *v.* Ross-Lewin, 29 Hun, 87.

[2] Thomas *v.* Whallon, 31 Barb., 172; Sands *v.* Sweet, 44 Barb., 108. And see Bangs *v.* Duckinfield, 18 N. Y., 592.

[3] Sands *v.* Sweet, 44 Barb., 108; Jackson *v.* Van Slyke, 44 Barb., 116, note a, overruling Campbell *v.* Adams, 38 Barb., 132.

[4] Bangs *v.* Duckinfield, 18 N. Y., 592.

[5] Bangs *v.* Gray, 12 N. Y., 477, reversing S. C., 15 Barb., 264.

is no note which is not chargeable to its full amount for liabilities justly attaching, he may make a general assessment upon all the notes to their full amount, without regard to classes, and without specifying the name of the party bound to contribute, or the amount of the note.[1] And the receiver is not required to prove all the facts upon which he or the company allowed the losses for which the assessment was made. All he is required to show, in this respect, is that sufficient claims for losses were presented to the company, or to him, and which he allowed, to make up the sum for which the assessment was levied.[2]

§ 332. It is also held that a receiver of an insolvent mutual insurance company, under the laws of New York, may properly allow equitable claims for losses against the company, although no actions to recover the same could be maintained, by reason of the neglect of the claimants to bring them within the time fixed by the charter or by-laws of the corporation, or by statute. And when such claims have been allowed the receiver is bound to pay them, if there be funds for that purpose; or if no funds, it is his duty to collect enough to satisfy such demands from the makers of the premium notes. And the maker of such a note can not defeat an action thereon by the receiver, brought for the collection of such an assessment, upon the ground that the receiver might have avoided allowance of the claims upon merely technical grounds, such as that they were not brought within the time prescribed by law for that purpose.[3]

§ 333. As regards the right or power of a receiver of a corporation to allow set-offs claimed by debtors to the corporation, against the indebtedness which he is seeking to enforce, it would seem that the right of set-off is dependent upon and governed by the same equitable principles which regulate the law of set-off in general, as between creditors and debtors. And where the debts are due to and from the

[1] Sands *v.* Sanders, 28 N. Y., 416.

[2] Sands *v.* Hill, 42 Barb., 651; Jackson *v.* Roberts, 31 N. Y., 304.

[3] Sands *v.* Hill, 42 Barb., 651.

same persons respectively, and in the same capacity, the right of the receiver to allow one to be set off against the other may be regarded as clear; but if otherwise, he will not be justified in allowing the set-off. And in cases of this nature, when there is doubt in the mind of the receiver as to what course he should pursue, it is proper and fitting that he should apply to the court for instructions.[1] And when the court, appointing receivers over an insolvent corporation, is empowered by statute with a general direction and control over them in the discharge of their duties, it may, upon a summary application, direct them to allow a set-off against a demand which they are seeking to enforce, if satisfied that such set-off is just and equitable.[2] But in an action by receivers of an insolvent corporation against a shareholder, to recover illegal dividends declared by the company, in violation of a statute prohibiting any dividends which might impair the capital stock of the corporation, the defendant shareholder will not be allowed to set off an indebtedness due to himself from the corporation; since, for the purposes of such action, the receivers do not represent the corporation, but its creditors, for whose benefit the suit is brought. The dividends thus illegally paid being a fraud upon the creditors of the insolvent corporation, and the reparation sought being the restoration of the funds for the benefit of the creditors, whom alone the receivers represent for the purposes of the action, claims growing out of independent matters between the defendant and the corporation itself are not a proper subject of set-off.[3]

§ 334. The first duty of receivers of insolvent corporations is to faithfully collect and justly disburse the assets of the corporation, which constitute a trust fund for its creditors. In the discharge of this duty, they are properly vested with a certain degree of discretion in the compromis-

[1] *In re* Van Allen, 37 Barb., 225.

[2] Holbrook *v.* Receivers of American Fire Insurance Co., 6 Paige, 220.

[3] Osgood *v.* Ogden, 4 Keyes, 70. See, also, Gillet *v.* Phillips, 13 N. Y., 114.

ing and settlement of demands against the corporation; but, in the exercise of their discretionary powers, they should keep constantly in view the interests of those whom they represent, and for whom they act. As illustrating this discretionary power, it is held that receivers of an insolvent banking corporation may properly decline to ratify a contract made by the corporation after its insolvency, when they are satisfied that the ratification of the contract would result in the loss of the fund entrusted to their charge.[1] But a receiver of an insurance company would seem to be limited, as to his powers in the adjustment of losses, to such powers as might have been lawfully exercised by the officers of the company. He is not, therefore, empowered by virtue of his appointment, in adjusting proofs of loss against the company, to dispense with or to waive express stipulations of the policy which relate to the substance of the contract.[2]

§ 335. Where receivers, who have been appointed in conformity with the laws of the state for winding up the affairs of an insolvent corporation, are authorized by the statute to settle all claims against the corporation, and to allow all demands of whose justice they are satisfied, they are limited to the allowance of such claims as might be recovered against the corporation, either at law or in equity, if suit were brought. And they have no authority to allow a demand, which is not a proper charge upon the fund in their hands, without the consent of all persons interested in having the claim rejected, the receivers in this respect being considered as guardians of the rights of all persons in interest. And where such receivers have disallowed demands against the corporation, and the matter has been referred to referees for adjustment, it is the duty of the receivers to resist the allowance of the demands before the referees, and to continue their defense as long as it can, in their opinion, be rendered effectual.[3]

[1] Suydam *v.* Receivers of Bank of New Brunswick, 2 Green Ch., 114. See, also, Same *v.* Same, id., 276.

[2] Evans *v.* Trimountain Mutual Fire Insurance Co., 9 Allen, 329.

[3] Attorney-General *v.* Life & Fire Insurance Co., 4 Paige, 224.

§ 336. It is competent for the court appointing a receiver over an insolvent corporation to authorize him to compromise disputed and doubtful claims by the allowance of such an amount as he may deem just and equitable; or to authorize him to submit such claims to arbitration when this method of settlement is provided by statute. The court may also empower him, generally, in any case where he may deem it expedient and for the interest of the creditors and shareholders, to compromise with debtors of the corporation who are unable to pay in full. And the receiver of such a corporation may allow its officers the amounts due to them for salaries, up to the time of his appointment, as debts to be paid ratably with other demands, no preference being given to the officers.[1]

§ 337. Where an incorporated company deposits certain securities with its creditor, as collateral to an indebtedness due from the corporation, but reserves the right or option of having such securities considered as an absolute payment upon notifying the creditor to that effect, and the corporation subsequently passes into the hands of a receiver, the option reserved to the company may be legally exercised or expressed by the receiver, who is for this purpose regarded as the legal representative of the corporation. And when the requisite notice is given by the receiver, it has the effect of making the deposit of collaterals an absolute payment, and thus releasing the indebtedness.[2]

§ 338. Receivers of an insolvent corporation, appointed under a statute authorizing such mode of winding up the affairs of insolvent companies, may make an assignment of a chose in action due to the corporation, without using the corporate seal, since the sale or assignment by the receivers is not the act of the corporate body itself, but rather the act of the receivers operating under the statute. And a sale by the receivers, under a power given them by statute for that purpose, is as effectual to convey the title as if the

[1] *In re* Croton Insurance Co., 3 Barb. Ch., 642.

[2] Phœnix Iron Co. *v.* New York Wrought Iron Railroad Chair Co., 3 Dutch., 484.

right of property was vested in them, and such sale need not, therefore, be authenticated by the corporate seal.[1] Nor is it a sufficient ground for setting aside a sale of the property of a corporation, made by its receiver, that the application for the order of sale was made by a judgment creditor of the corporation, who was also a justice of the court to which the application was made, or that it is alleged that he was able, by means of his official position, to exercise an improper influence upon the proceedings in the court in which they were taken, when it does not appear that his official position resulted in producing any different order from that authorized by the settled practice of the court, or from that which would have been given upon the application of any other person.[2]

§ 339. When receivers of a corporation institute an action for the collection of money demands alleged to be due, the proceeding being carried on for the enhancement of the fund in the receivers' hands and for the benefit of those who may be finally determined to be entitled thereto, if they are unsuccessful in such suit, the defendant is entitled to costs out of the fund in the receivers' hands. And in such case, the defendant will not be required to await the final distribution of the assets of the corporation, and then share with other creditors or parties in interest *pro rata*, but is entitled to an immediate order for payment of the costs out of any funds in the receivers' hands.[3]

[1] Hoyt *v.* Thompson, 5 N. Y., 320, reversing S. C., 3 Sandf., 416.

[2] Libby *v.* Rosekrans, 55 Barb., 218.

[3] Columbian Insurance Co. *v.* Stevens. 37 N. Y., 536. "The right of the defendants," says Woodruff, J., p. 537, "to have judgment for their costs in such an action as the present, brought against them for the recovery of money only, is absolute as well by the law before as since the code of procedure. There is no claim nor ground of claim that the allowance of costs in the action was discretionary. The liability of the receiver in whom the alleged cause of action became vested after the summons herein was served, and by whom the action was prosecuted, is made by section 321 of the code, the same as if he had caused himself to be made a party. The questions here are, therefore: 1. In an action prosecuted by receivers for the col-

§ 340. Where an action is brought by the state against receivers of a corporation, for the purpose of enforcing the collection of taxes due from the corporation, and judgment is recovered against the receivers, the judgment should be so entered as to be enforced only against the funds that are or should be in the hands of defendants as receivers.[1]

§ 341. When a corporation is dissolved under proceedings in a state court, and a receiver is appointed to close up its affairs, the enforcement and collection by the receiver of a demand against a debtor of the corporation is not a "taking under legal process," within the meaning of the

lection of alleged money demands, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, is the defendant entitled to costs to be paid to him immediately, or must he stand as a general creditor to await the final administration, and receive only (as the case may be) his distributive share of the fund *pro rata*, with those for whose benefit he has been subjected to a groundless litigation? 2. Is the question stated addressed to the discretion of the court, in such sense that no appeal lies to this tribunal from the decision made below? It was conceded on the argument that the costs in question are chargeable upon and are to be collected out of the fund. This could not well be denied, and yet, in a case in which it does not appear by anything stated in the papers that there are other claims on that fund, of any sort, except the interests of the stockholders of the company, it would seem to follow, as of course, that the receiver should have been directed to pay those costs. Such an order is the appropriate mode of reaching funds in the receiver's hands. Not being in form a party to the action, no execution could reach the property he holds, and being the custodian of the fund as an officer of the court, he is subject to immediate direction to pay it to a party entitled. If it be assumed that the company was insolvent, and that the funds which the receiver holds or may collect may not prove sufficient to satisfy all the creditors of the company, this does not, in my opinion, upon clear and just rules governing the subject, impair the defendants' right to be paid in full, the fund being confessedly sufficient. The receiver is *pro hac vice* the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity toward third parties that actions like the present should be prosecuted by the company or such representative, otherwise than at the expense and risk of the fund which it is sought thereby to increase."

[1] Commonwealth *v.* Runk, 26 Pa. St., 235.

national bankrupt act, so as to constitute an act of bankruptcy.[1]

§ 342. Where a receiver is appointed over an insolvent insurance company, with authority to collect debts and to pay liabilities, upon a bill by judgment creditors of the corporation against the receiver, to compel him to bring suits for the recovery of its assets, it is not proper for the court to decree that the receiver should apply the money in payment of the judgments; but he should be directed to bring it into court, in order that the court itself may distribute it to the parties entitled.[2]

[1] *In re* New Amsterdam Fire Insurance Co., 6 Benedict, 368.

[2] Benneson *v.* Bill, 62 Ill., 408.

III. Receivers of Insolvent Corporations.

§ 343. Under the laws and practice of many of the states, the jurisdiction of equity over corporate bodies has been enlarged to the extent of authorizing the appointment of receivers, upon the insolvency of the corporation, for the protection of creditors and shareholders; and the statutory

power thus conferred is in some of the states sufficiently broad to authorize the court to dissolve the corporate organization, and to completely annihilate the franchise.[1] Usually the power of appointing receivers over corporations is conferred by legislative enactment upon the courts themselves; but in some instances it is vested in executive officers of the government, as in the case of receivers of national banks, appointed by the comptroller of the currency, under the provisions of the national banking act of June 3, 1864.[2] And since the appointment of a receiver *in limine* is not regarded as a strictly judicial act, in the sense of being a decree or judgment affecting title to property, or finally determining the rights of the parties, it is competent for the legislature to authorize the executive department of the

[1] In New York, the appointment of receivers over insolvent insurance companies, and the functions and duties of such receivers, are largely regulated by legislation. As to the power of the court under such legislation to adjudicate upon claims against the company and to pay dividends, and as to the right of appeal from such orders, and the right of other creditors to intervene and be heard concerning such matters, and as to costs upon such intervention, see People *v.* Security Life Insurance Co., 71 N. Y., 222. As to the proper method of distribution of the assets of an insolvent insurance company among its creditors, when a receiver has been appointed under the New York statute, the method of computing amounts due to policy-holders as a basis for payment of dividends, priorities among different classes of creditors, allowances for death losses, and set-offs of premium notes due from policy-holders, see People *v.* Security Life Insurance Co., 78 N. Y., 114; Attorney-General *v.* North America Life Insurance Co., 82 N. Y., 172; Attorney-General *v.* Guardian Mutual Life Insurance Co., 82 N. Y., 336. As to proof of claims of creditors and policy-holders in such cases, and extension of time for such proofs and notice to creditors, see People *v.* Security Life Insurance Co., 79 N. Y., 267. As to the right of such a receiver to a *mandamus* to compel the superintendent of the insurance department to pay to the receiver the proceeds of securities deposited by the company with the superintendent, see Attorney-General *v.* North America Life Insurance Co., 80 N. Y., 152. As to the compensation of such receivers, and the basis upon which it will be allowed upon receipts and disbursements, see Attorney-General *v.* North America Life Insurance Co., 89 N. Y., 94.

[2] 13 U. S. Statutes at Large, p. 99. See § 50; U. S. Revised Statutes, § 5234.

government to appoint receivers, with authority to take charge of and wind up the affairs of insolvent corporations, such as banking institutions. Nor does such legislation in any manner impair the obligation of the original contract with the corporation, by taking from it the right secured by its charter to sue and be sued in its corporate name, the appointment of the receiver being for the purpose of preserving and not destroying rights.[1]

§ 344. The primary object, however, of proceedings in chancery against insolvent and failing corporations, when such proceedings are authorized by statute, is not so much a dissolution of the charter, which is the appropriate duty of a court of law, as to protect and preserve the corporate assets for the benefit of creditors. And it may, therefore, be regarded as discretionary with the court whether to continue the possession of the receiver, or to allow the corporation to resume the management of its own affairs, if satisfied that the interest of all parties will be best subserved in this way.[2] So under a statute authorizing the appointment of receivers over insolvent corporations, the court will decline to appoint, although the corporation is insolvent, if its directors, who are trustworthy persons, are closing up its affairs, and if all the creditors and all stockholders save complainant are satisfied with the management of the directors.[3]

§ 345. In Louisiana, the right of the courts to appoint a receiver for the protection of all parties in interest, pending proceedings for the liquidation and settlement of the affairs of an insolvent corporation, is treated as too well established to admit of question.[4] And when proceedings are pending for the forfeiture of the charter of an insolvent corporation and for the settlement of its affairs, the appointment of a receiver does not have the effect of reviving the corporate

[1] Carey *v.* Giles, 9 Ga., 253.

[2] Fay *v.* Erie & Kalamazoo Railroad Bank, Harring. (Mich.), 194.

[3] City Pottery Co. *v.* Yates, 37 N. J. Eq., 543.

[4] Stark *v.* Burke, 5 La. An., 740.

body, it being merely a necessary measure for protecting the property and preserving the rights of creditors.[1]

§ 346. Where the statutes of a state provide that a receiver may be appointed when a corporation has been dissolved, or when it "is in imminent danger of insolvency, or has forfeited its corporate rights," in proceedings against an insurance company for the appointment of a receiver under the statute, it is sufficient ground for the relief to allege that the company is insolvent and unable to meet its liabilities, and that its officers have misapplied the funds and are rapidly wasting the only means of the company for the payment of losses. Such a state of facts, if it does not show an absolute condition of insolvency, shows at least that there is such "imminent danger of insolvency" as to warrant the appointment of a receiver under the statute. And the facts alleged being sufficient to give the court jurisdiction of the subject-matter, and authority to appoint a receiver, its proceedings in making such appointment, even if erroneous, can not be called in question in a collateral action.[2] But an affidavit alleging the insolvency of a banking corporation, upon information and belief, will not warrant the court in interposing its extraordinary aid by appointing a receiver, when such affidavit is contradicted by the regular official reports of the bank, made under oath and published by direction of law, since such reports are presumed to be entitled to at least as much weight, judicially, as the affidavit.[3] And the courts will not exercise their statutory power of appointing receivers over an insolvent corporation, upon an *ex parte* application, and without giving the defendant an opportunity to be heard. But upon filing a petition duly verified, setting forth the grounds on which the application is based, an order to show cause should issue and a copy thereof should be

[1] Stark *v.* Burke, 5 La. An., 740.

[2] Howard *v.* Whitman, 29 Ind., 557.

[3] Livingston *v.* Bank of New York, 26 Barb., 304; S. C., 5 Ab. Pr., 338. It is otherwise, however, where such affidavit is not thus contradicted. Attorney-General *v.* Bank of Columbia, 1 Paige, 511.

served upon the officers of the corporation, directing them to show cause on a future day why the application should not be granted.[1]

§ 346 *a.* Shareholders are entitled to a receiver over the corporation upon a bill for relief against a note and mortgage executed by the officers of the corporation fraudulently and without adequate consideration, their conduct having been such as to render it unfit that they should retain control of the affairs of the corporation pending the litigation.[2] But, after the appointment of a receiver under a statute for winding up insolvent corporations, it is still competent for the court to entertain an independent action by a judgment creditor to set aside an alleged fraudulent transfer of the corporate property, the receiver having taken no steps to set aside such transfer. And such an action is, in effect, an application to the court to direct the receiver in the discharge of his duty and may be maintained as such.[3] So when the property of an insolvent corporation has passed into the hands of a receiver, and the corporation is managed and its business conducted through the receiver, questions pertaining to the administration of the business must be left largely to the discretion of the court having the receivership in charge. And a court of appellate jurisdiction will be reluctant to disturb the action of the court below upon such questions, unless in cases of flagrant error and injustice.[4]

§ 347. Upon the appointment of a receiver of all the assets and effects of a corporation, for the purpose of sequestrating its property and closing up its affairs, it is proper for the court, in connection with such appointment and as a part of the order, to enjoin the directors and officers of the

[1] Devoe *v.* Ithaca & Owego R. Co., 5 Paige, 521. As to the sufficiency of the allegations necessary to procure a receiver of an insolvent corporation under the statutes of Wisconsin, and as to the functions and powers of such a receiver when appointed, see Powers *v.* Hamilton Paper Co., 60 Wis., 23.

[2] Avery *v.* Blees Manufacturing Co., 27 N. J. Eq., 412.

[3] Monitor Furnace Co. *v.* Peters, 40 Ohio St., 575.

[4] Wilmington Star Mining Co. *v.* Allen, 95 Ill., 288.

corporation from collecting any debts or demands, and from delivering or encumbering any of the corporate property to any other person, such an injunction being regarded as an appropriate adjunct of the receivership.[1] It by no means follows, however, because an injunction has been granted against a corporation, restraining it from continuing in business because of its insolvency, that a receiver will necessarily be appointed to wind up its affairs, even though by the statute authorizing the proceeding the court is fully empowered to appoint a receiver. And where, in such case, it is apparent to the court that a receiver is not necessary for the protection of the interests either of creditors or of stockholders, and that a stranger to the affairs of the company can not wind up its business as advantageously as its directors, a receiver will be refused and the management will be left in the hands of the directors, who may be required to act under the immediate control and direction of the court.[2] But the court will not leave the management of the affairs of a corporation in the hands of its directors or officers, after declaring the corporation itself insolvent, unless it is shown to be for the interest of the creditors and shareholders that this course should be pursued. And when fraudulent and improper conduct is shown against the officers of the corporation, in making illegal sales of its property and effects after the insolvency, it is the clear duty of the court to take the management out of the hands of such officers, and to place it in the hands of a receiver, and the court has no discretion in the premises.[3]

§ 348. As regards the effect of appointing a receiver of an insolvent corporation upon the rights of creditors, the decisions are not altogether harmonious, owing, doubtless, to the difference in the various statutes in force in the sev-

[1] Morgan *v.* New York & Albany R. Co., 10 Paige, 290.

[2] Rawnsley *v.* Trenton Mutual Life & Fire Insurance Co., 1 Stockt., 347. See, also, Oakley *v.* Paterson Bank, 1 Green Ch., 173; Nichols *v.* Perry Patent Arm Co., 3 Stockt., 126.

[3] Nichols *v.* Perry Patent Arm Co., 3 Stockt., 126.

eral states, under which the courts are empowered to appoint receivers over corporate bodies. It may, however, be regarded as an established rule, that such appointment does not affect or impair a lien already acquired by the creditor upon assets of the corporation. Where, therefore, under the statutes of the state for the winding up of insolvent corporations, a receiver of such a body is appointed and an injunction is granted against the corporation, such proceedings do not have the effect of dissolving an attachment of the assets of the corporation previously made by a creditor, and a creditor who has been thus diligent in acquiring a lien by attachment will be allowed to retain it, notwithstanding the subsequent proceedings.[1] But when a receiver is appointed to take charge of the assets of a banking corporation for the benefit of creditors, and he has filed his bond with security, which has been approved by the court, the assets of the corporation, though not yet reduced to possession by the receiver, are regarded as in custody of the law, *in gremio legis*, and not liable to levy under an attachment in favor of a creditor of the bank.[2]

§ 349. When receivers are appointed to take charge of the affairs of an insolvent corporation *pendente lite*, it is held that such proceeding does not prevent the general creditors from enforcing their demands by suit, when it does not appear that the appointment was made with a view to a settlement and an equal distribution of the corporate funds to all the creditors, but only to provide for the safety of the assets pending the litigation. And, in such a case, the lien acquired by a judgment creditor upon the real estate of the corporation will be upheld, notwithstanding the appointment and possession of the receivers, and even though the judgment was obtained after such appointment and possession.[3] But the lien acquired by the judgment

[1] Hubbard *v.* Hamilton Bank, 7 Met., 340.

[2] Hagedon *v.* Bank of Wisconsin, 1 Pin. (Wis.), 61. And see comments upon this case in Atchison *v.* Davidson, 2 Pin. (Wis.), 48.

[3] Ellicott *v.* United States Insurance Co., 7 Gill, 307. But see At-

creditor, under such circumstances, is only a lien upon such interest in the real estate of the corporation as was held by it at the time of the appointment of the receivers, and it will not be extended to the increased value of the property resulting from payments of purchase money made thereon by the receivers.[1]

§ 350. Where the statute of a state, regulating the winding up of banking corporations by receivers, provides that no action shall be maintained against a bank after the appointment of a receiver, but that all creditors shall have their remedy under the provisions of the statute, the courts will not entertain an action brought against the bank by one of its creditors, such an enactment being regarded as constitutional and within the power of the legislative branch of the government.[2] And where, under the laws of the state, a receiver for winding up the affairs of an insolvent corporation, upon the final order for his appointment becomes absolutely entitled to all the property and effects of the corporation, for the purpose of distributing them among its creditors and shareholders, such final order is in the nature of a decree in an ordinary creditors' suit, against executors or others who are trustees of a fund upon which several creditors have claims for the payment of their debts ratably, or according to a specified order of priorities. And in such case, any creditors, who are not nominal parties to the suit, may make themselves such parties in fact by coming in and presenting their claims under the decree, and by submitting themselves to the jurisdiction of the court for the adjustment of their demands; and a creditor thus coming in as a *quasi* party to the action is entitled to the full benefit of the decree.[3]

torney-General *v.* Continental Life Insurance Co., 28 Hun, 360.

[1] Ellicott *v.* United States Insurance Co., 7 Gill, 307.

[2] Leathers *v.* Shipbuilders Bank, 40 Me., 386.

[3] *In re* City Bank of Buffalo, 10 Paige, 378. And see, as to the time when plaintiff, in an action pending against an insolvent corporation, may prove up his claim and share in a dividend declared by the receiver, Smith *v.* Manhattan Insurance Co., 4 Hun, 127.

§ 351. It is held in New Jersey, that the appointment of a receiver over an insolvent corporation, under the statute conferring such jurisdiction, operates as a conveyance or transfer of all the property of the corporation to the receiver for the benefit of creditors, and to be distributed in accordance with the statute.[1] It is, therefore, held that rents of the corporate property, accruing after its sale by the receivers, belong to the purchaser of the property, while rents accruing after the appointment of the receivers, but before a sale of the premises by them, belong to the receivers for the benefit of creditors.[2] But an action will not lie against the receiver to recover for legal services rendered to the corporation after the appointment of the receiver, although such services rendered before the receivership may be recovered against him. And the question of what allowance should be made out of the funds of the receivership for counsel fees and legal services rendered to the corporation in resisting the appointment of a receiver would seem to be wholly within the discretion of the court.[3]

§ 352. When the affairs of an insolvent corporation have passed into the hands of a receiver, in an action instituted in behalf of all the creditors, and the court is authorized and required by the statute conferring the jurisdiction to cause the property and assets of the corporation to be distributed among its creditors *pro rata*, it will not permit actions to be prosecuted against shareholders for their unpaid

[1] Corrigan *v.* Trenton Delaware Falls Co., 3 Halst. Ch., 489. It was held, however, in an earlier case in New Jersey, that the corporate property did not vest in the receivers by virtue of their appointment, and that such appointment did not necessarily put an end to the existence of the corporate body, the receivers being substituted in place of the managers and directors of the corporation for the purpose of closing up its affairs, and that the title to its property did not change, the power only being delegated to the receivers to take charge of and sell it. Willink *v.* Morris Canal and Banking Co., 3 Green Ch., 377.

[2] Corrigan *v.* Trenton Delaware Falls Co., 3 Halst. Ch., 489. See, also, Fish *v.* Potts, 4 Halst. Ch., 277, affirmed on appeal to the court of errors and appeals, id., 909.

[3] Barnes *v.* Newcomb, 89 N. Y., 108.

subscriptions by creditors of the corporation, whereby they might obtain a preference over other creditors. The receiver being appointed for the benefit of the creditors, and the property and choses in action of the corporation being vested in him for their benefit, by virtue of his appointment, if the shareholders are liable to the corporation for unpaid balances on account of their subscriptions to the capital stock, such liability can be enforced only by the receiver, and not by individual creditors.[1]

§ 353. Under a statute making it the duty of the attorney-general of the state, whenever any incorporated bank becomes insolvent and unable to pay its debts, to apply to a court of equity for an injunction and a receiver, and for the winding up of the corporation, when the fact of the insolvency of the bank is satisfactorily established, the court to which the application is addressed has no discretion left as to the appointment, and a receiver will be granted as of course.[2] And it is not necessary that the information filed by the attorney-general should be verified by a positive affidavit as to the insolvency of the bank, but it is sufficient that it is alleged on information and belief, since no person but the officers of the bank could swear positively as to its insolvency.[3]

§ 354. Upon compulsory proceedings, under a statute, for the appointment of a receiver to wind up an insolvent banking corporation, it is regarded as improper to appoint an officer of the bank as receiver, since if the officers as such are unfit for the management of the bank in that capacity, the court will not entrust its management to them as receivers, the rule of exclusion, in such case, being based upon

[1] Rankine *v.* Elliott, 16 N. Y., 377.

[2] Attorney-General *v.* Bank of Columbia, 1 Paige, 511.

[3] Attorney-General *v.* Bank of Columbia, 1 Paige, 511. Where, however, the allegations as to insolvency rest on information and belief, and are contradicted by the regular official reports of the bank, made under oath and published according to law, a receiver will not be appointed. Livingston *v.* Bank of New York, 26 Barb., 304; S. C., 5 Ab. Pr., 338.

principles of sound public policy.[1] It is otherwise, however, when the proceedings are instituted voluntarily by the corporation for a dissolution, and when the statute regulating them authorizes the appointment of officers or shareholders as receivers. And under such circumstances, it is proper to appoint the president and book-keeper, when it is not shown that their conduct or management of the business has in any manner tended to produce the insolvency of the corporation.[2]

§ 355. Where, under the laws of a state, the appointment of a receiver over an insolvent corporation operates as a virtual dissolution of the corporate body, substituting the receiver in lieu thereof as to all its property and effects, in a contest concerning the right to certain property of the corporation in the hands of its receiver, the answer of the corporation itself under the corporate seal can have no effect in determining the controversy, since the litigation is between the claimant and the receiver alone.[3]

§ 356. While a purchaser of the assets of an insolvent corporation, sold at a receiver's sale, obtains by his purchase such title as the receiver himself had, he can not by such purchase from the receiver acquire any right of action against a former officer of the corporation, to compel him to account for assets and effects of the corporation in his hands in the capacity of trustee.[4] But a shareholder who has joined in the proceedings for a dissolution of an insolvent corporation and for a receiver is estopped from questioning the appointment, and from questioning an order of court directing the receiver to sell the corporate assets.[5]

§ 357. Where a receiver has been appointed of the effects of a corporation, under a statute authorizing receivers in cases of insolvency, it is proper for the court to discharge

[1] Attorney-General *v.* Bank of Columbia, 1 Paige, 511.

[2] *In re* Eagle Iron Works, 8 Paige, 385, affirming S. C., 3 Edw. Ch., 385.

[3] Davenport *v.* City Bank of Buffalo, 9 Paige, 12.

[4] Mann *v.* Fairchild, 2 Keyes, 106.

[5] Battershall *v.* Davis, 31 Barb., 323.

him upon motion of the defendant corporation, upon its satisfying the court that it is in solvent circumstances and able to resume business, and that the best interests of the creditors will thereby be secured.[1] The interests of the creditors are in all cases to be kept in view in determining whether the receiver shall be continued or discharged. And a creditor who has, upon his own bill, obtained the appointment of a receiver, is not entitled as of right, upon the settlement of his own debt, to have the receiver discharged, when the rights of other creditors have intervened. In such a case, it is the right and duty of the court to protect the interests of all the creditors who may have presented their demands.[2]

[1] Ferry *v.* Bank of Central New York, 15 How. Pr., 445.

[2] Fay *v.* Erie & Kalamazoo Railroad Bank, Harring. (Mich.), 194.

IV. Receivers of National Banks.

§ 358. The subject of the appointment of receivers over national banks incorporated under the act of congress of June 3, 1864, and of the functions and powers of such receivers, is one of considerable importance, and has been presented to the courts in several different aspects. Under the fiftieth section of the act in question, commonly known as the National Banking Act, authority is conferred upon the comptroller of the currency to appoint receivers over national banks, upon their refusal to pay their circulating notes, and the general duties of receivers thus appointed are defined by the statute.[1] It would seem that the ap-

[1] Act of June 3, 1864, 13 Statutes at Large, 99. Section 50 contains the following provision: "That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to such association, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the

pointment of a receiver under this section has the effect of superseding the authority of the directors to exercise the incidental powers necessary to carry on the business of banking, although the corporate franchise is not destroyed, and the bank as a legal entity still continues to exist.[1] And since the bank still has an existence, it is proper to institute an action against it in its corporate capacity, in which capacity it should be defended.[2]

§ 359. As regards the title acquired by a receiver of a national bank thus appointed, the true doctrine seems to be that he holds only such estate and title as the bank itself had in its assets, his title being similar in this respect to that

twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of all his acts and proceedings." Section 50 of the original act, as above quoted, is substantially re-enacted in section 5234 of the Revised Statutes of the United States, as follows: "On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

[1] Bank of Bethel *v.* Pahquioque Bank, 14 Wal., 383. See, also, Security Bank *v.* National Bank of the Commonwealth, 2 Hun, 287; Green *v.* Walkill National Bank, 7 Hun, 63.

[2] Security Bank *v.* National Bank of the Commonwealth, 2 Hun, 287. See, also, Green *v.* Walkill National Bank, 7 Hun, 63. As to the effect of appointing a receiver upon the right of action of shareholders to recover from the directors because of fraudulent and negligent management of the bank, see Brinckerhoff *v.* Bostwick, 88 N. Y., 52.

of an assignee in bankruptcy. He is not a third person in the sense of commercial transactions, and can not avoid a pledge of assets of the bank which could not be avoided by the corporation itself. When, therefore, the bank has deposited notes constituting a part of its assets with a creditor as security for advances, the bank itself being concluded by the deposit or pledge, the receiver is not entitled to such notes, and can not maintain an action therefor until the creditor or pledgee is made whole for his advances.[1] And the personal property and assets of the bank are still exempt from taxation under state laws, notwithstanding the appointment of a receiver, being regarded in legal contemplation as still belonging to the bank, to be administered according to law.[2]

§ 360. A receiver of a national bank appointed by the comptroller, under this section of the act, is limited as to his functions by the object of the receivership and the duties which it involves.[3] Practically such a receiver is the mere agent of the comptroller of the currency, for the purpose of bringing the residue of the assets into the United States treasury. And while, for the full accomplishment of the object of the statute, and the due performance of his duties, all necessary authority is conferred upon him, yet this authority does not extend to the control of bonds deposited by the bank with the treasurer of the United States to secure the currency of the bank. The receiver, therefore, has no concern with and is not a proper party defendant to a suit brought to establish title to such bonds by one claiming them by assignment from the bank.[4] He has, however, undoubted authority to bring suits to enforce demands due the bank,[5] and such actions may be instituted, either in his

[1] Casey *v.* La Societé de Credit Mobilier, U. S. Circuit Court, District of Louisiana, June, 1875, 7 Chicago Legal News, 313; S. C., 2 Woods, 77.

[2] Rosenblatt *v.* Johnston, 104 U. S., 462.

[3] Van Antwerp *v.* Hulburd, 8 Blatchf., 282; Ellis *v.* Little, 27 Kan., 707.

[4] Van Antwerp *v.* Hulburd, 8 Blatchf., 282.

[5] Bank *v.* Kennedy, 17 Wal., 19; Platt *v.* Crawford, 8 Ab. Pr., N. S.,

own name or in the name of the bank.[1] And it is not neces sary that he should first obtain consent of the comptroller, before beginning such an action, the case being clearly distinguishable from that of an action against shareholders to enforce their personal liability.[2] The authority to bring such actions for the enforcement of demands due to the bank, in addition to being expressed by the act of congress, is regarded as a necessary incident to the proper discharge of the receiver's functions.[3] But the receiver can not render himself liable, or charge the estate in his hands, by any executory contract, unless authorized so to do by the provisions of the national banking act and by the order of a court of competent jurisdiction obtained under the terms of that act. And under an order authorizing him to sell the property of the bank, he can not make a binding contract to exchange or barter it for other property, and can not be held liable in an action for damages resulting from his refusal or inability to comply with such a contract, which he is without power to make. And his powers being limited, one who deals with him in his official capacity is chargeable with knowledge of his authority and contracts at his own peril.[4]

§ 360 *a*. The receiver may maintain an action in his own name to enforce the individual liability of shareholders, such power being expressly conferred by the statute. And he is not required to proceed by bill in equity against all the shareholders to collect an assessment made by the comp-

297. See, also, Kennedy *v.* Gibson, 8 Wal., 498; Bank of Bethel *v.* Pahquioque Bank, 14 Wal., 383.

[1] Bank *v.* Kennedy, 17 Wal., 19. See, also, Kennedy *v.* Gibson, *supra;* Bank of Bethel *v.* Pahquioque Bank, 14 Wal., 383.

[2] Bank *v.* Kennedy, 17 Wal., 19. The court, Bradley, J., say, p. 22: "His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do."

[3] Platt *v.* Crawford, 8 Ab. Pr., N. S., 297.

[4] Ellis *v.* Little, 27 Kan., 707.

troller of the currency, but may proceed by separate actions at law against individual shareholders.[1] He may also maintain a bill in equity to set aside a transfer of his stock made by a shareholder for the purpose of evading his individual liability. And a letter from the comptroller of the currency, directing the receiver to institute legal proceedings to enforce the liability of shareholders under the act of congress, is sufficient evidence that the comptroller has determined it to be necessary to enforce such liability.[2] Being regarded, however, merely as the instrument of the comptroller, he can not institute proceedings against the stockholders of the bank to enforce their personal liability, without the consent and direction of the comptroller; since it is for the latter to decide when it is necessary to institute such proceedings, and whether the whole or a part, and if only a part how much, shall be collected.[3] But the determination of the comptroller as to the necessity for and the amount of the assessment is conclusive in an action by the receiver against a shareholder to recover such assessment.[4] If, however, the individual liability of shareholders is sought to be enforced by a general creditors' bill, pursuant to the act of congress of June 30, 1876, amendatory of the national banking act, the pendency of such suit constitutes a good plea in abatement to an action brought by a receiver of the bank subsequently appointed by the comptroller to enforce the same liability.[5]

§ 361. In an action brought by such a receiver to recover an indebtedness due to the bank, the debtor can not inquire into the legality of the receiver's appointment, and it is sufficient for the purposes of such suit that he is appointed and is receiver in fact; since the action of the comptroller in making the appointment is conclusive, until set aside upon the application of the bank itself. It is not, therefore, nec-

[1] U. S. Revised Statutes, § 5234.

[2] Bowden *v.* Johnson, 107 U. S., 251.

[3] Kennedy *v.* Gibson, 8 Wal., 498.

[4] Strong *v.* Southworth, 8 Ben., 331.

[5] Harvey *v.* Lord, 11 Biss., 144.

essary in such action that the receiver should specifically aver the existence of all the conditions necessary to satisfy the comptroller that a receiver should be appointed.[1] And a general allegation of the receiver's appointment by the comptroller, and of his taking possession of the assets, is sufficient, without setting forth in detail the circumstances leading to such action.[2] As regards the proof required upon the trial as to the receiver's appointment and authority to sue, it would seem to be sufficient to produce a certificate from the comptroller of the currency, approved and concurred in by the secretary of the treasury, reciting the existence of all the facts necessary to authorize the appointment, and the fact of the appointment with the concurrence of the secretary of the treasury.[3]

§ 362. It is important to observe that the power exercised by the comptroller of the currency, in appointing receivers over national banks, under section 50, of the act of congress of June 3, 1864, is not exclusive of the jurisdiction of equity to appoint receivers over such banks, in cases where the courts would otherwise be authorized to interfere against insolvent corporations.[4] And a judgment creditor of a national bank, who has exhausted his remedy at law, and who is entitled to a receiver under the law and practice of the state, may have a receiver of such a bank, upon a bill in the federal court charging that its officers have made fraudulent payments and preferences, and that there is no property of the corporation subject to seizure or execution, which plaintiff can obtain by any proceeding at law, the comptroller having declined to appoint a receiver for want of authority.[5] And in the absence of any action by the

[1] Cadle *v.* Baker, 20 Wall., 650.

[2] Platt *v.* Crawford, 8 Ab. Pr., N. S., 297.

[3] Platt *v.* Beebe, 57 N. Y., 339.

[4] Irons *v.* Manufacturers National Bank, 6 Biss., 301; Wright *v.* Merchants National Bank, 1 Flippin, 568.

[5] Irons *v.* Manufacturers National Bank, 6 Biss., 301. This was an ordinary creditors' bill, alleging the recovery of judgment against de-

comptroller of the currency toward the appointment of a receiver, a court of equity may grant the relief upon an

fendant, the return of execution unsatisfied, and also charging the officers of the defendant corporation with having made fraudulent preferences and payments. It appeared from an exhibit annexed to the bill, that certain creditors of the bank had previously applied to the comptroller of the currency to appoint a receiver, which he declined to do on the ground that the relations between the bank and his department having ceased, he had no authority to interfere. Upon demurrer to the bill, it was held that the court had full jurisdiction in the premises, and a receiver was accordingly appointed. Blodgett, J., held as follows: ". . It would seem from an examination of the banking law, that the comptroller of the currency has no authority to appoint a receiver except in certain contingencies, such as the failure to make good a reserve, the failure to reduce circulating notes on demand, the failure to make good the capital stock whenever the same becomes impaired, and the failure to meet certain other requirements of the banking law. Now, neither of these contingencies is charged in this bill to have occurred, and it is only in the case of such contingencies that the comptroller acquires the right to appoint a receiver. It is claimed on the part of the defendant, and has been very strenuously and ingeniously argued, that there is no power in any court to appoint a receiver for this bank, because the delegation of the power to the comptroller of the currency to appoint a receiver in certain contingencies to wind up the affairs of the bank, excludes the authority of any tribunal or person to appoint a receiver. I have carefully examined the banking law, and the decisions of the supreme court, and those of various states made since this banking law took effect, upon the various questions which have arisen, and do not find that this precise question has ever been made. But I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is under an act of congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against this corporation, as much as against any other corporation, except where there are specific provisions to meet those cases. For instance, a holder of the circulating notes of the bank, who had presented them for payment, and payment had been refused, would undoubtedly find this remedy within the special provisions of the banking law itself, because there is a specific provision meeting that case, and his remedy would undoubtedly be found in the action of the comptroller of the currency. But, in a large class of cases, when the defendant corporation may not have infringed any of the specific provisions of the banking law, which authorized the comptroller to appoint

ordinary judgment creditors' bill, notwithstanding the remedy provided by the act of Congress.[1]

§ 363. The federal courts alone having jurisdiction under the acts of congress over national banks, the fact that a receiver of such a bank appointed by the comptroller of the currency is substituted as a defendant in an action in the state court, originally begun against the bank, does not enlarge the powers of the state court, or confer upon it a jurisdiction which it did not have over the bank itself. The state court, therefore, having had no jurisdiction over the

a receiver, there may be cases where they have at some time rendered themselves liable to be proceeded against as any other debtor for the failure to pay their debts. The allegations in this bill are very full that this bank was insolvent at the time it closed its doors, and has been ever since; that it failed to pay its debts; that a large amount of its debts are still unpaid; and the question is, what remedy have the creditors of this bank if a court of equity can not take on itself the administration of its affairs where the banking law does not provide that it shall be done by the comptroller of the currency? It is true that in the case of Kennedy *v.* Gibson, 8 Wallace, the supreme court state that the provision of the banking law making the stockholders liable for the debts of the corporation to the amount of the stock held by them respectively, could not be enforced except under the action of the comptroller through a receiver appointed by him. Whether that opinion will be found to entirely express the full meaning and intention of the supreme court whenever they come to examine it in the light of future cases and facts which might be brought before it, is doubted by myself, at least. I do not feel sure that the supreme court will adhere to quite as broad a statement as is made in that case; but still they may. But even that does not oust the jurisdiction of a court of equity to take hold of whatever assets the bank may have, aside from the personal liability of the stockholders, and administer those as it would the affairs of any insolvent corporation. The law is well settled in this state, and the courts of the United States, that the proper remedy of a creditor against a corporation, when the assets are of such a nature that they can not be levied upon and sold on execution, is by a proceeding in equity to marshal and distribute the assets. It is unnecessary to cite authorities upon that question. The law, I think, is as well settled as any branch of the law can be considered as settled in this country."

[1] Wright *v.* Merchants National Bank, 1 Flippin, 568.

bank itself, acquires no power to give judgment against the receiver.[1] And the receiver is regarded as an officer of the United States in such sense as to entitle him to maintain an action to recover an indebtedness due to the bank, or to recover assessments made by the comptroller of the currency in the federal court in the district in which the bank is located.[2] So the jurisdiction conferred upon the district courts of the United States, over all suits by or against national banks,[3] is sufficient to authorize such courts to appoint a receiver over a railway company at the suit of a national bank.[4]

§ 364. Although, as has been already shown, an action may be instituted against a national bank in its corporate capacity, notwithstanding the appointment of a receiver by the comptroller of the currency,[5] yet the property of the bank, which is attached at the suit of an individual creditor, can not be subjected to sale in satisfaction of his demand as against the receiver. And it is the receiver's duty, in such a case, to apply to the court to dissolve the attachment.[6] So the object of the national banking act being to secure to the United States, a preference or priority of lien upon the assets of the bank, for any deficiency in redeeming its notes, and then to secure the assets for ratable distribution among the general creditors, this object will not be allowed to be defeated by attachment suits against the bank after its insolvency.[7] And if the receiver promptly brings suit to recover funds of the bank which have been attached after its insolvency, joining all parties in interest as defendants,

[1] Cadle *v.* Tracy, 11 Blatchf., 101.

[2] Frelinghuysen *v.* Baldwin, 12 Fed. Rep., 395; Price *v.* Abbott, 17 Fed. Rep., 506; Platt *v.* Beach, 2 Ben., 303.

[3] U. S. Revised Statutes, § 563.

[4] Fifth National Bank *v.* P. & C. S. R. Co., 1 Fed. Rep., 190.

[5] Security Bank *v.* National Bank of the Commonwealth, 2 Hun, 287.

[6] National Bank *v.* Colby, 21 Wal., 609.

[7] National Bank *v.* Colby, 21 Wal., 609; Harvey *v.* Allen, 16 Blatchf., 29.

he is entitled to recover such assets, notwithstanding a judgment in the state court in favor of the attaching creditors, under which the money is actually received by them before judgment in the receiver's suit.[1] So when the property of the bank is levied upon by state authorities in satisfaction of a tax levied after the bank became insolvent, it is proper to enjoin a sale of such property upon the application of the receiver.[2]

[1] Harvey *v.* Allen, 16 Blatchf., 29.

[2] Woodward *v.* Ellsworth, 4 Col., 580.

CHAPTER XI.

OF RECEIVERS OVER RAILWAYS.

I. Principles Governing the Jurisdiction.

§ 365. While the jurisdiction of equity over railway corporations, as enlarged by the statutes and practice of the various states, is based upon and exercised in accordance with substantially the same principles which govern its jurisdiction over other corporations, the courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than over other corporate bodies. The importance of these corporations, as being *quasi* public bodies, and the peculiar nature of their property and franchises, sufficiently explain the reluctance with which equity interferes with their management, and in general the courts proceed with extreme caution in placing them in the hands of receivers.[1] And whenever the ordinary remedies provided by law are open to the creditors of such corporations for the enforcement of their demands, the appointment and continuance of a receiver in office for a long period of years is the exercise of a judicial power which can only be justified by the pressure of an absolute necessity. Thus, when a judgment creditor of a railway company, which is in the receipt of large earnings and operating an extended line of railway, has the ordinary means open to him of enforcing his judgment, the courts will not countenance the taking of the railroad property from its rightful possession, and putting it into the hands of a receiver; especially when the judgment is for a small amount, as compared with the receipts of the company, and when its lien is seriously controverted.[2] Nor does the alleged violation by stockholders of a railway company of an injunction restraining the consolidation of two companies warrant the appointment of a receiver, when it is not shown that the company or any of its directors intend to surrender or transfer its property in

[1] Milwaukee & Minnesota R. Co. *v.* Soutter, 2 Wal., 510; S. C., Woolworth's C. C., 49; Stevens *v.* Davison, 18 Grat., 819; Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110; Overton *v.* M. & L. R. Co., 10 Fed. Rep., 866; S. C., 3 McCrary, 436; Meyer *v.* Johnston, 53 Ala., 237; Kelly *v.* Trustees, 58 Ala., 489.

[2] Milwaukee & Minnesota Railroad Co. *v.* Soutter, 2 Wal., 510.

violation of such injunction. Nor should a receiver be appointed over a railway without notice to the company, when neither fraud nor insolvency is charged against the defendants, and when it does not appear that the property of the company is in danger of removal beyond the jurisdiction of the court, the controversy being solely as to the effect of an alleged illegal consolidation with another railway company.[1] So it is not the province of a court of equity to conduct the business of a railway for the mere convenience of the parties, or except where the exercise of its extraordinary jurisdiction is indispensable for the protection of some clear right of the suitor. And when a receiver has been appointed by collusion between the parties, in order to protect the road from adverse proceedings by creditors, and to enable the parties, through the receiver, to apply the entire income to the improvement of the property and not to the payment of its debts, the court, upon being apprised of the facts, may of its own motion discharge the receiver.[2]

§ 366. While, as is thus seen, courts of equity are extremely averse to the appointment of receivers to take charge of and manage railway corporations, yet the relief will be granted where the aid of equity is indispensable to secure the rights of the legitimate shareholders, and to prevent a failure of justice. For example, when the board of directors of a railway company, without authority of law and without the sanction of a lawful meeting of the share-

[1] Railway Company *v.* Jewett, 37 Ohio St., 649. But receivers have been appointed over a railway upon the application of the company itself, the bill averring its insolvency and inability to meet its mortgage and floating indebtedness, and praying the appointment of receivers and the sale of its property for the benefit of all concerned. In this case, the railway system in question was made up by the consolidation of numerous lines of road, which had been separately mortgaged prior to such consolidation, the bill averring that if the system was broken up as an entirety, and if separate receivers were appointed over the several lines thus separately mortgaged, irreparable injury would result to all persons in interest. Wabash, St. L. & P. R. Co. *v.* Central Trust Co., 22 Fed. Rep., 272.

[2] Sage *v.* M. & L. R. Co., 5 McCrary, 643.

holders, by whom alone such action could be authorized, have made a lease for years of the road and property of the corporation, the lease being absolutely null and void, upon a bill filed by a shareholder, in behalf of himself and such other shareholders as may elect to join in the proceedings, to set aside the lease, the court may appoint a receiver to take charge of and manage the road, until it can be ascertained by proper inquiry who are the legitimate shareholders, and to whom the custody and management of the road shall be committed.[1]

§ 367. In England, a receiver may be allowed for the protection of a vendor's lien for real estate sold to a railway, upon failure to pay the purchase money and insolvency of the company. Thus, where a land owner contracts with a railway company to convey to it certain lands for the construction of its road, and on its failure to complete the purchase he obtains a decree for the specific performance of the contract, and declaring his vendor's lien upon the premises for the balance of unpaid purchase money, upon the insolvency of the company the vendor may have a receiver, although not entitled to an injunction to restrain the company from operating its cars over and using the land. In such case, the railway corporation is treated precisely as any other insolvent purchaser, and the receiver is appointed for the preservation of the property, and to render it profitable for all parties in interest.[2] But in such case, a receiver will not be appointed before a final decree for the specific performance of the contract.[3]

[1] Stevens *v.* Davison, 18 Grat., 819.

[2] Munns *v.* Isle of Wight R. Co., L. R., 5 Ch., 414.

[3] Latimer *v.* A. & B. R. Co., 9 Ch. D., 385. It is worthy of note that the English Court of Chancery was extremely averse to appointing a receiver over a railway with power to manage and operate the road, upon the ground that it would not assume the permanent management of a business or undertaking, especially when, as in the case of a railway, such management had been delegated by Parliament to the company itself. Thus, in Gardner *v.* London, C. & D. R. Co., L. R., 2 Ch., 201, which was an application by debenture holders for a receiver over a railway, Lord

§ 368. The jurisdiction of equity over railway corporations, in the management of a common easement or right

Justice Cairns says, p. 212: "But in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway which would, in my opinion, make it improper for the Court of Chancery to assume the management of it at all. When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They can not be delegated or transferred. The company will, of course, act by its servants, for a corporation can not act otherwise, but the responsibility will be that of the company. The company can not, by agreement, hand over the management of the road to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself, or its officer, without any parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company do not object to the order for the manager. This may well be so. But in the view I take of the case, the order would be improper, even if made on the express agreement and request of the company."

But by the Railway Companies Act of 1867, 30th and 31st Victoria, chapter 127, section 4, it was provided as follows: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this act, and before the 1st day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this act, or in an action not on a contract commenced after the passing of this act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery in England or in Ireland, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working

to which different companies are entitled, is regarded as well settled to the extent, if necessary, of appointing a receiver to hold and manage the easement, should occasion require. And where several railway companies are tenants in common of an easement, or right of passage through a tunnel, a court of equity will entertain a bill for an injunction and a receiver, upon a question of conflict between two of the companies as to their relative rights in the tunnel; but the court will not appoint a receiver of the tunnel, if, from all the circumstances of the case, it is satisfied that the rights of the parties may be preserved and protected without such appointment.[1]

§ 369. Upon a bill filed against a railway company by the holder of certain shares of stock, which are alleged to have been issued in violation of the charter and contrary to law, the bill praying an injunction and a receiver, and that the company may be decreed to pay to the receiver a sufficient sum to enable him to repay to plaintiff the amount advanced for the stock, no sufficient cause is presented to justify the appointment of a receiver, when the moneys received for the stock have passed into the general funds of the corporation, and can no longer be traced or identified.[2]

expenses of the railway and other proper outgoings in respect to the undertaking, be applied and distributed under the direction of the court in payment of the debts of the company or otherwise, according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid, the court may, if it think fit, discharge such receiver or such receiver and manager." And this section was made perpetual in 1875, 38th and 39th Victoria, chapter 31. For a full discussion of the effect of this act, and of the circumstances justifying the appointment of a manager as well as receiver, and of the eligibility of the directors or officers of the company as such manager and receiver, see *In re* Manchester & Milford R. Co., 14 Ch. D., 645. See, also, *In re* Birmingham & L. J. R. Co., 18 Ch. D., 155; *In re* Southern Railway Co., 5 L. R., Ir., 165.

[1] Delaware, Lackawanna & Western R. Co. *v.* Erie R. Co., 6 C. E. Green, 298.

[2] Whelpley *v.* Erie Railway Co., 6 Blatchf., 271.

§ 370. It is held, where receivers over a railroad have been appointed under proceedings in the state courts, and have taken possession of the property of the road and entered upon their duties, before the instituting of proceedings in bankruptcy in the United States courts against the company, that the bankrupt court will not interfere with the possession and control of the receivers under the state court, unless for some cause for which the title of the receivers might be impeached under the bankrupt act. And until their title is thus impeached, the management and control of the road and of the property in the hands of the receivers will be left to the state courts.[1] So when a railway company is in the hands of a receiver appointed by a federal court, no rights can be acquired under condemnation proceedings instituted in a state court by a telegraph company against the railway to obtain a right of way over the property of the latter, if such proceedings are brought without leave of the court appointing the receiver.[2]

§ 370 *a*. The practice has been adopted in some instances of appointing two receivers over a railway, but this course is ordinarily regarded as unnecessary and embarrassing, a single receiver being preferred, both upon considerations of economy and of harmonious action. And when two receivers have been appointed in the first instance, by consent of the parties, as the representatives of different interests, and they prove unable to harmonize in the management of the receivership, it is proper to remove them and to appoint a single receiver; and such receiver should be wholly uninterested in the affairs of the company, and a resident within the jurisdiction of the court appointing him and in which the affairs of the road are to be administered.[3]

§ 370 *b*. It is to be observed that the appointment of a receiver over a railway does not operate as a dissolution of

[1] Alden *v.* B., H. & E. R. Co., 5 Bank. Reg., 230.

[2] Western Union Telegraph Co. *v.* Atlantic & Pacific Telegraph Co., 7 Biss., 367.

[3] Meier *v.* Kansas Pacific R. Co., 5 Dill., 476.

the corporation itself.[1] Such appointment, therefore, and the sale of the entire property of the company do not afford ground for judgment of ouster against the directors of the company elected after the appointment of the receiver.[2] And the fact that a railway has passed into the hands of receivers, pending proceedings by the company for *mandamus* to compel the delivery of municipal-aid bonds, affords no ground for abating the *mandamus* proceedings, or for refusing to comply with the *mandamus*, since the corporation still remains in being and capable of suing and of being sued.[3] So an injunction, granted by a state court, restraining a railway company from obstructing certain streets in a city, is held to be operative upon receivers of the company afterward appointed by a federal court, and they may be punished as for contempt in disregarding such injunction, although they have been removed from their receivership when proceedings for contempt are instituted against them. Nor can one of the two receivers, in such case, escape liability by having remained inactive in the matter, since it was his duty to prevent disobedience of the injunction, and he can not avoid liability by mere inaction.[4] So the fact that a railway has passed into the hands of receivers, who are operating the road and receiving its earnings, constitutes no bar to a judgment in favor of the state against the company for taxes due to the state upon the gross earnings of the road while operated by the receivers.[5]

§ 371. While receivers over railways are usually appointed in aid of foreclosure proceedings, after default in payment of the mortgage indebtedness, the relief has been

[1] State *v.* Merchant, 37 Ohio St., 251; People *v.* Barnett, 91 Ill., 422.

[2] State *v.* Merchant, 37 Ohio St., 251.

[3] People *v.* Barnett, 91 Ill., 422.

[4] Safford *v.* People, 85 Ill., 558.

[5] Philadelphia & Reading R. Co. *v.* Commonwealth, 104 Pa. St., 80. As to the right to levy upon and sell the property of a railway which is in the hands of a receiver of a federal court, to satisfy unpaid taxes due to the state under the laws of Georgia, see State *v.* A. & G. R. Co., 3 Woods, 434.

allowed before default when the company was insolvent and unable to pay either mortgage or floating indebtedness, and unable to pay amounts due to connecting lines, and in danger of the absolute destruction of its business and about to default in payment of interest upon its mortgages.[1] And where a statute of a state authorizes and provides for the appointment of receivers, to take charge of and operate any railway which shall discontinue its operations for a given length of time, the object of the statute being the relief of citizens residing along the line of the suspended road, and a receiver is accordingly appointed over a railway company which has failed to operate its road for the prescribed time, while the court may and will restore the property to the company or to its rightful owners, upon being satisfied of their ability and willingness to operate and manage the road, it will not stay the operation of the receivership for the purpose of inquiring as to the causes which have led to the failure to operate the road. In such a case, the public necessity will be regarded as of paramount importance, and the receiver will not be relieved until the court is satisfied that the exigency has ceased which called for the appointment.[2]

§ 372. When the owner of lands has conveyed them to a railway, in consideration of an annual rent charge, reserving by his conveyance the right to enter upon the lands conveyed, and to distrain for rent whenever it may be in arrear, the subsequent appointment of a receiver over the railway will not be allowed to disturb the vendor's rights. And upon application to the court he will be given leave to distrain, notwithstanding the receiver's possession, such a

[1] Brassey *v.* N. Y. & N. E. R. Co., 19 Fed. Rep., 663; S. C., 22 Blatchf., 72.

[2] *In re* Long Branch & Sea Shore R. Co., 9 C. E. Green, 398. As to the right of a state to take possession of a railway, under an act of legislature, in the event of the insolvency of the company and its failure to pay its bonds guaranteed by the state, after the appointment of a receiver in behalf of its bondholders, see *Ex parte* Dunn, 8 S. C., 207.

case being similar to that of an application by a stranger for leave to bring an action of ejectment.[1] But the court will not, under such circumstances, grant permission to distrain upon property of the railway company which had been conveyed to trustees for the benefit of creditors, nor upon locomotives passing over the land for the purpose of working the line.[2]

§ 373. A receiver appointed over a railway company, who is authorized by the order of his appointment to secure and protect the assets, franchises and rights of the company, as well as a land grant and reservation due the company from the state, may maintain a bill in equity for an injunction against officers of the state to prevent them from granting to other persons the same lands which had been previously granted to the railway, and which the state has attempted to forfeit. Such a suit by the receiver is regarded as auxiliary to the original action, and is analogous to a petition by a receiver to the court to protect his possession from disturbance, or the property in his charge from destruction.[3] And persons who interfere with the running of trains upon a railway which is in the hands of a receiver, and who take possession of the trains and prevent the employees of the receiver from operating them, are guilty of a contempt of court, and may be punished by proceedings for contempt in the cause in which the receiver was appointed.[4] But the primary object of the receivership being to preserve the railway for the benefit of its creditors, the court will not extend its jurisdiction beyond the necessity for such preservation. It will not, therefore, upon the petition of the company, assume jurisdiction over the question of postponing a stockholders' meeting called for the election

[1] Eyton *v.* Denbigh, Ruthin & Corwen R. Co., L. R., 6 Eq., 14. See, also, S. C., id., 488.

[2] Eyton *v.* Denbigh, Ruthin & Corwen R. Co., L. R., 6 Eq., 488.

[3] Davis *v.* Gray, 16 Wall., 203, affirming S. C., 1 Woods, 420.

[4] Secor *v.* T., P. & W. R. Co., 7 Biss., 513; King *v.* O. & M. R. Co., 7 Biss., 529.

of officers, the exercise of such jurisdiction not being pertinent to the purposes of the receivership.[1]

§ 374. When a receiver has been appointed in a state court over a railway company, and its franchises are declared forfeited, and its property is placed in the receiver's hands, a United States court will not entertain a bill for an account against the receiver and the corporation, but will leave the party aggrieved to pursue his remedy by applying to the court which appointed the receiver, and under whose control he acts.[2] So when a railway is being operated by a receiver, appointed by a court of competent jurisdiction, *mandamus* will not lie against the company and its receiver to direct or control the operations of the road, the court appointing the receiver being fully empowered to determine all questions in controversy.[3]

§ 375. When a receiver is appointed over a railway company, and defendant afterward moves and plaintiff consents that the order of his appointment be vacated, the motion, being concurred in by all parties in interest, should be granted so far as to restore the possession, management and control of the road to the owner; and such control should manifestly include the receipt and disbursement of its future earnings. It is, therefore, error for the court to require the receiver to restore the railroad and its appurtenances and management to the company, but to still require him to receive and disburse the earnings and income.[4] And a receiver of a railway, who enters into a fraudulent combination with third parties for the purchase of the road at a foreclosure sale, furnishing information for this purpose in violation of his trust, can not maintain a bill against such purchasers for an accounting and for the recovery of a share of the profits arising from such fraudulent transaction.[5]

[1] Taylor *v.* P. & R. R. Co 7 Fed. Rep., 381.

[2] Conkling *v.* Butler, 4 Biss., 22.

[3] State *v.* M. & C. R. Co., 35 Ohio St., 154.

[4] L'Engle *v.* Florida Central R. Co., 14 Fla., 266.

[5] Farley *v.* St. P., M. & M. R. Co., 4 McCrary, 138.

II. Receivers in Aid of Mortgagees and Bondholders.

§ 376. The most frequent ground for invoking the extraordinary aid of equity by the appointment of receivers over railway corporations is for the protection of mortgagees and bondholders, whose securities are a lien upon the road, upon the failure of the corporation to pay the principal or interest upon its obligations thus secured. And in actions for the foreclosure of railway mortgages, given to secure bonds issued by railway companies for purposes of construction and equipment, the courts, upon an application for a receiver in behalf of the mortgagees, proceed upon the usual principles governing applications for receivers in aid of the

foreclosure of mortgages; and in conformity with such principles, inadequacy of the mortgage security, coupled with insolvency of the mortgagor, may be regarded as sufficient ground for the relief.[1] And while the courts are reluctant to exercise their jurisdiction in this class of cases, except upon a strong showing, yet if the road and its appurtenances are manifestly an inadequate security for the mortgage indebtedness, and the corporation is shown to be insolvent, a receiver will be appointed and the company and its agents will be enjoined from any interference with him or with the property.[2] And when, upon a bill to foreclose mortgages given by a railway company to secure its bonds, the insolvency of the company and inadequacy of the security are shown, and the company has neglected to apply its earnings, which are the only fund for that purpose, in payment of the bonded indebtedness secured by the mortgages, such neglect, in connection with the other circumstances shown, constitutes an abuse sufficient to justify the interference of equity by a receiver.[3] So it is proper to appoint

[1] Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110; Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101; Kelly *v.* Trustees, 58 Ala., 489. As to the appointment of a receiver in behalf of judgment creditors of a railway in an action to sequestrate its property under the statutes of New York, as to the practice in such cases, as to the powers and duties of such a receiver, and as to his relative rights compared with those of a receiver over the same railway in a foreclosure suit, see Whitney *v.* N. Y. & A. R. Co., 32 Hun, 164.

[2] Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110.

[3] Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101. This was a bill of foreclosure by trustees named in certain railway mortgages, executed to secure the bonded indebtedness of the road, the bill also praying that a receiver might be appointed. The court, Withey, J., say, p. 102: "The rule asserted is that a receiver will not be appointed unless there has been abuse, or is danger of abuse, on the part of the mortgagor or party in possession. Receivers are not appointed as a matter of course, but it rests in the sound discretion of the court. Whether the power will be exercised depends always

a receiver over a railway company in behalf of mortgage bondholders, when the interest upon the mortgages has been long unpaid, and when it is apparent that the mortgaged property will not bring sufficient to satisfy the indebtedness.[1]

§ 377. But the appointment of a receiver is not a matter of course in aid of the foreclosure of a mortgage given by a railway corporation, upon default in the payment of any portion of the interest of the indebtedness.[2] And when, by the terms of a mortgage or deed of trust executed by a railway company to secure its bonds, it is provided that the trustee, on default of payment either of principal or interest, may take possession of the property

upon the facts and rights as they appear before the court. There is a multitude of cases showing where the power has and where it has not been exercised, each case depending on its particular facts and circumstances. From the decided cases, the general rule which should govern is abundantly illustrated. One ingredient to justify the appointment of a receiver, in a case of foreclosure of mortgaged premises, is that the security is inadequate. This the bill avers; another, that the party to the suit is in possession by himself or his tenant, and the proper parties are before the court; such is this case; again, the mortgagor, or party personally liable for the debt, must be shown to be irresponsible for any deficiency on sale of the mortgaged premises; this the bill shows. A large amount of interest is overdue and unpaid. From the case before the court, it would seem that the interest must be met from the earnings of the road, and yet the net earnings are not applied. Is it not an abuse on the part of the mortgagors, if insolvent, that the net earnings are not applied to the interest? What excuse exists for the omission? The obligation of the mortgagor is common to all mortgagors, viz: to meet its accrued indebtedness, and if its only means with which to meet the interest are not thus applied, such neglect of a paramount obligation is little less than an abuse which will justify the appointment of a receiver, in connection with all the facts in this case. The mortgage provides that in case of default in payment of any interest or principal of the secured debt, the trustees may take possession of the road and property in person, or by a receiver, and operate the road. The court is of opinion that a receiver should be appointed with the usual powers in such cases. The order may be drawn and submitted to the court for approval."

[1] Pullan *v.* Cincinnati & Chicago R. Co., 4 Biss., 35.

[2] Williamson *v.* New Albany R. Co., 1 Biss., 198; Tysen *v.* Wabash R. Co., 8 Biss., 247.

mortgaged, but the trustee upon default does not elect to take possession, and institutes an action for the appointment of a receiver, in the absence of any facts showing an abuse in the management of the company the court will exercise an equitable discretion in the matter, and will refuse to allow a receiver when it would cause irreparable injury to the company.[1] And in the exercise of the discretion vested in courts of equity touching the appointment of receivers, a receiver will not be appointed in aid of the foreclosure of a railroad mortgage when much greater injury would result to all parties in interest by such appointment than by permitting the road to be operated by the company pending the foreclosure proceedings.[2]

§ 378. Proceedings for the appointment of receivers, in actions for the foreclosure of railway mortgages, are regarded as *in rem*, to the extent that they seek to reach such property of the corporation as was mortgaged to secure the bondholders. And the right of the receiver to the possession of the corporate property, being subject to the same limitations governing the rights of the mortgage bondholders in whose behalf he was appointed, extends only to the specific property which is the subject of the litigation and covered by the mortgage.[3] But a court of equity, having appointed a receiver over a railway in an action for the foreclosure of a mortgage, may exercise all necessary powers with reference to the protection and preservation of the property for the benefit of its creditors which are not in excess of the powers of the corporation itself. It may, therefore, authorize the receiver to lease other lines of railway to be operated in connection with, and as a part of, the road over which he is appointed, when such course is necessary for the interests of the creditors.[4]

[1] Williamson *v.* New Albany R. Co., 1 Biss., 198; Union Trust Co. *v.* St. L., I. M. & S. R. Co., 4 Dill., 114.

[2] Tysen *v.* Wabash R. Co., 8 Biss., 247.

[3] Noyes *v.* Rich, 52 Me., 115.

[4] Gibert *v.* W. C., V. M. & G. S. R. Co., 33 Grat., 586.

§ 379. Railway mortgages, or deeds of trust in the nature of mortgages, frequently contain a provision authorizing the trustee or mortgagee, in case of default, to take possession of and manage the railway and to receive and apply its income. In such cases, where the trustees have a complete remedy at law to recover possession, the court may properly refuse to appoint a receiver when it does not appear that the trustees have made any effort to obtain possession, or that the mortgaged premises are an inadequate security.[1] If, however, the trustees neglect and refuse to take possession after default and a request from the bondholders, upon a bill by the bondholders to enforce the trust, a receiver may be appointed, the right to the relief, in such case, not being dependent upon inadequacy of the mortgage security.[2] Nor is the right to relief, in such cases, confined to actions for the foreclosure of the mortgage, since a receiver may be appointed upon a bill seeking to obtain possession after default, the railway company being insolvent and the security inadequate.[3] So a receiver may be appointed, after default, in an action brought by a surviving trustee in the deed of trust to enforce the trust and to obtain possession of the property.[4] And it has been held, where the deed of trust authorized the trustees to take possession upon default, that the default itself constituted sufficient ground for a receiver, without showing the inadequacy of the mortgage security.[5]

[1] Rice *v.* St. Paul & Pacific R. Co., 24 Minn., 464. But see Allen *v.* D. & W. R. Co., 3 Woods, 316.

[2] Wilmer *v.* A. & R. A. L. R. Co., 2 Woods, 409.

[3] Dow *v.* M. & L. R. Co., 20 Fed. Rep., 260. In this case, the court required plaintiffs, as a condition to the appointment of the receiver, to consent that all debts due to other companies for freight and ticket balances, all debts for labor, supplies and materials used in equipping, repairing or operating the road, and all obligations incurred in transporting freight or passengers, or for injuries to persons or property, which had accrued within six months prior to the appointment, should be paid by the receiver out of the earnings of the road, or if not so paid should constitute a lien upon the road paramount to that of the mortgage indebtedness.

[4] Sacramento & P. R. Co. *v.* Superior Court, 55 Cal., 453.

[5] Allen *v.* D. & W. R. Co., 3 Woods, 316. But in this case, additional grounds for the relief were

And a receiver has been appointed after a decree of foreclosure, in behalf of bondholders entitled to the net income of the road, when, under the laws of the state, no sale could be had until the expiration of six months from the date of the decree.[1]

§ 380. The doctrine of the English Court of Chancery was, that where a company, incorporated by act of parliament as a common carrier, is authorized by its act of incorporation to borrow money by mortgaging its tolls, and in pursuance of such authority has mortgaged its tolls to secure advances and loans obtained for carrying on the undertaking, the mortgagee is entitled to the aid of equity by a receiver upon non-payment of his principal when due.[2] And the receiver thus appointed will be ordered to pay the costs of the proceeding, and then to keep down the interest on the mortgages and pay the balance into court.[3] It is held, in such cases, that the power of mortgaging the corporate tolls and rents necessarily carries with it as an incident all the appropriate and necessary remedies to compel payment. Equity may, therefore, appoint a receiver of the tolls in an action to foreclose the mortgage, even though the power is not conferred in express terms by the act of parliament, the remedy being a necessary incident of the powers expressly granted.[4] And it is no objection to the appointment of a receiver of the tolls, rates, duties and other property of a railway, upon the application of a mortgagee, that the court can not prescribe everything which is necessary to be done for the proper management of the affairs of the corpora-

found in the fact that the company was actually insolvent, that the contractor for building the road had failed and abandoned his contract, and that the charter and a valuable land grant were about to lapse by the non-completion of a small remaining portion of the road within the time required by law.

[1] Benedict *v.* St. J. & W. R. Co., 19 Fed. Rep., 173.

[2] Hopkins *v.* Worcester & Birmingham Canal Proprietors, L. R., 6 Eq., 437; De Winton *v.* Mayor of Brecon, 26 Beav., 533.

[3] Hopkins *v.* Worcester & Birmingham Canal Proprietors, L. R., 6 Eq., 437.

[4] De Winton *v.* Mayor of Brecon, 26 Beav., 533.

tion, and that it is liable to indictment in case the receiver does not perform the duties required of the company by its act of incorporation.[1]

§ 381. It is held, in the Irish Chancery, that railway bondholders are entitled to a receiver over the tolls and traffic of the road, when their bonds are an equitable charge upon such tolls, and when the inconvenience of proceeding at law for the enforcement of their demands is so great as to render the legal remedy practically useless. And it is not necessary, to entitle them to the relief, that the bondholders should have first recovered judgment at law and issued execution, when the right to be paid out of the tolls is attached to the bonds themselves, and a receiver previously appointed over the tolls of the company will be extended to the payment of the demands of such bondholders.[2] But a judgment creditor of a railway company, whose judgment is only a lien or charge upon its lands, to the extent of such estate or interest as the corporation itself has in them, is not entitled, upon obtaining a receiver of the railway, to be paid the profits received by the receiver in priority to interest due on mortgages of the company which antedate his judgment.[3]

§ 382. The jurisdiction of the English Court of Chancery, in this class of cases, was sometimes invoked when there were different mortgagees of the tolls, who were entitled to have them applied for the payment of their advances. And when the trustees of an incorporated turnpike company are authorized by the act of incorporation to mortgage its tolls, the mortgagee may have a receiver of the tolls if there are other mortgages thereon, and he will not be required to take proceedings at law to obtain possession under his mortgage. Indeed, such a case would seem to be a stronger one for the interposition of equity by a receiver

[1] Fripp *v.* The Chard R. Co., 11 Hare, 241; S. C., 17 Jur., 887; S. C., 22 L. J., N. S., 1084.

[2] Imperial Mercantile Credit Association *v.* Newry & Armagh R. Co., Ir. Rep., 2 Eq., 1.

[3] Holland *v.* Cork & Kinsale R. Co., Ir. Rep., 2 Eq., 417.

than the case of an ordinary mortgage of lands.[1] And when a railway company, incorporated by act of parliament, is authorized to obtain loans by mortgaging its rates, tolls, duties and other property, a second mortgagee, who has advanced money to the company upon this security, is entitled to a receiver in an action to establish his mortgage, when it is shown that the property is unproductive as to the second mortgagees, and their interest has been unpaid for a series of years. And the relief may be allowed in such a case, even though, by the act of incorporation, special provision is made for the appointment of a receiver in behalf of a mortgagee on application to justices of the peace for that purpose, the act providing that this special remedy shall be without prejudice to any remedies, either at law or in equity, which the mortgagee may have. In such a case, it constitutes no sufficient objection to granting the relief sought that the mortgagee has not joined as defendants to the action other mortgagees secured by the same mortgage with himself.[2]

§ 383. As between different mortgage creditors of a railway company, whose mortgages are a charge upon the property of the company, to be paid *pari passu*, and without priority or preference, equity will not permit one of the mortgagees to obtain a preference over others. And where

[1] Crewe *v.* Edleston, 1 De G. & J., 93. "It is to be observed, too," says Lord Justice Turner, p. 109, "that the rights under a mortgage of this description differ materially from the rights under an ordinary mortgage of land. Under an ordinary mortgage the mortgagee, when he enters into possession, holds for his own benefit. Under a mortgage of this description he becomes, when he enters into possession, liable to the other mortgagees, to the extent of their interests. This liability, I apprehend, would entitle him, immediately upon possession taken, to come to this court to have it ascertained what is due upon the other mortgages, and for a receiver to aid him in the due application of the tolls, and if this court can be called upon to appoint a receiver immediately after the possession recovered at law, it can hardly be necessary that the proceedings at law should first be taken."

[2] Fripp *v.* The Chard R. Co., 11 Hare, 241; S. C., 17 Jur., 887; 22 L. J., N. S., 1084.

some of the mortgagees have filed a bill for an account of the principal and interest due upon their mortgages, and have obtained a receiver of the railway and its tolls, the court will not allow another of the mortgagees, who has obtained judgment upon his demand, to issue execution against the property of the company, otherwise than as trustee for himself and all other mortgage creditors of the company. But the court may, in such case, direct an inquiry as to whether it will be for the benefit of the mortgage creditors generally that any proceedings should be taken for the purpose of making the judgment available for their benefit.[1]

§ 384. Where a railway company, chartered by two different states, and whose line of road lies in both of the states, executes a mortgage of the entire line of its road to one of the states to secure the payment of an annuity due from the company, and the state occupies the relation of a second and third incumbrancer, it is entitled to the aid of a receiver, upon a bill showing that the tolls and revenues of the road are being diverted to the payment of junior obligations and liens, in violation of the duty incumbent upon the corporation. And although the courts of the state in which the relief is granted have jurisdiction of the matter only within the limits of that state, they will yet interfere to the extent of their jurisdiction; and the fact that their authority does not extend beyond the territorial limits of the state will not deter them from acting, in a proper case, to the extent of such limits. In such a case, the defendant, as to that portion of its property and franchises within the limits of the state where the relief is sought, will be treated as a domestic corporation and will be dealt with accordingly.[2]

§ 385. When a mortgagee of the tolls of a turnpike company, under an act of parliament providing that none of the mortgagees of such tolls should have preference over others, had taken possession of the turnpike gates without any

[1] Bowen *v.* Brecon R. Co., L. R., 3 Eq., 541.

[2] State of Maryland *v.* Northern Central R. Co., 18 Md., 193.

legal proceedings, and was in receipt of the tolls and retained the entire amount in discharge of his own demand, instead of applying it for the benefit of all the mortgagees *pari passu*, as required by the act of parliament, an injunction was granted against him and a receiver of the tolls was appointed, upon the application of another mortgagee.[1]

§ 386. When a railway company is endowed with a valuable land grant, which constitutes the principal security of its bondholders, and there is danger of the grant lapsing before the completion of the road, which is required to be completed within a specified time, a receiver may be appointed on application of the bondholders, the exigencies of the case being regarded as sufficient to warrant a court of equity in interfering. And such receiver may be authorized to borrow money sufficient to complete the line within the time specified, and to issue his obligations for that purpose, which may be made a lien upon the road.[2]

§ 387. In an action for the foreclosure of a mortgage given by a railway company to secure its bonds, it affords no sufficient objection to appointing a receiver in behalf of the bondholders, that the proceedings of the corporation in issuing the bonds and mortgage are impeached by mere negative testimony, as by an affidavit of the secretary of the company stating that he is not able to find any record of authority, given by the stockholders to the directors or officers of the company, to execute the bonds and mortgage in question. Since, upon a preliminary application for the appointment of a receiver, the court will not pass upon or determine the validity of the bonds, but will leave that question to the final hearing.[3]

§ 388. Questions of difficulty have occurred in determining the relative jurisdiction of the state and federal

[1] Dumville *v.* Ashbrooke, 3 Russ., 99, note c.

[2] Kennedy *v.* St. Paul & Pacific R. Co., 2 Dill., 448. And see this case for form of order appointing a receiver under such circumstances. See, also, S. C., 5 Dill., 519.

[3] Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101.

courts, upon applications for receivers in aid of the foreclosure of railway mortgages. The true rule upon this subject undoubtedly is, that the court first acquiring jurisdiction of the subject-matter, or of the *res*, will retain jurisdiction to the end of the litigation, and will, if necessary, take possession or control of the property by a receiver, to the exclusion of all interference from other courts of concurrent jurisdiction.[1] Accordingly, when a trustee in a deed of trust, given by a railway company to secure its bonds, files his bill in the United States court for a foreclosure, which thus obtains jurisdiction of the subject-matter, and pending this action, and without leave of the federal court, the trustee institutes proceedings in a state court to foreclose the same trust deed, upon which a receiver is appointed, a foreclosure ordered and the property sold, the United States court retains its jurisdiction. It may, therefore, upon a proper showing of the necessity for a receiver, make such appointment on the application of one of the bondholders secured by the mortgage, and the interference of the state court will be treated as unauthorized, and as not affecting the previously acquired jurisdiction of the federal tribunal.[2]

[1] Bill *v.* New Albany R. Co., 2 Biss., 390; Union Trust Co. *v.* The Rockford, Rock Island & St. Louis R. Co., U. S. Circuit Court, Northern District of Illinois, 7 Chicago Legal News, 33. See, also, to the same effect, Gaylord *v.* The Fort Wayne, Muncie & Cincinnati R. Co., U. S. Circuit Court, District of Indiana, decided by Drummond, J., 1875, unreported.

[2] Bill *v.* New Albany R. Co., 2 Biss., 390. The principles governing in such case are well stated by Drummond, J., p. 400, as follows: "It could hardly be said then to be fair dealing, while the case was thus proceeding here, for the trustee and some of the bondholders to turn over to another jurisdiction rights which had been partially adjudicated, thus ignoring everything that occurred here. It is true that they seem to have had the opinion of a state court to justify their action, but as this court was the one in which the controversy was originally commenced, and in which, for certain purposes, it was yet pending, it is the only tribunal whose decision was binding upon the parties in this court. Before he adopted so grave a measure, therefore, and one calculated so much to complicate and embarrass matters in dispute, he should have come to this court for directions and relief. One litigation should have been disposed of before another on the same subject-matter

Nor is it necessary, in the application of the general rule as above stated, that the court which first acquires jurisdiction of the case shall also first take by its officers possession of the property in controversy, since this would only lead to unseemly haste on the part of receivers to reduce the property to manual possession; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with greater haste, might, by seizing the property, render the first suit wholly unavailing. And where a bill in the United States court, in behalf of holders of railway bonds, seeking the aid of a receiver for the protection of their security, was dismissed upon demurrer, but afterward, and at the same term, this judgment was set

was begun. The fact appears to be, that the trustee and the first bondholders thought that the last bondholders had ceased to have any interest in the road, because of the inadequacy of the property to respond to inferior liens, and acted accordingly — a conclusion which could only be reached under the authority of this court. Inasmuch, therefore, as the case was still here, as for certain purposes the property was subject to the control of the court, in the interests of the parties before it, to appeal to another court to foreclose the mortgages and sell the road was unwarranted, and not consistent with the obligations due to all. The trustee was responsible just as much to others as he was to those who demanded he should foreclose, and whose instructions he obeyed. If, then, it was a breach of duty for Williamson to proceed in the court of common pleas of White county, as I think it was, what is the effect upon the right of this court to retain jurisdiction of the cause and of the subject-matter? There can be no doubt it has created great confusion in the position of those claiming under the mortgages, and embarrassment in the court to deal properly with their interests. It has thus brought about an apparent conflict between courts, state and federal, which should always be avoided. But the conflict arises from acts done after this court had obtained jurisdiction of the cause, and for which, therefore, it can not be justly held accountable; and when a party affected by an order or decree entered in a pending cause asks for relief, it is no answer to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of the court to give relief. The question always must be, is it competent for the court to act? If so, its duty is plain, and it necessarily follows from what has been said, that, in my opinion, the property is still within the control of this court to adjudicate upon the equitable rights of all who have ever been before it."

aside and the bill reinstated, and plaintiffs were allowed to amend, a receiver was appointed to take charge of the railway for the protection of the bondholders, notwithstanding another creditor of the company, in the interval between the dismissal of the bill and its reinstatement in the federal court, had filed a bill in the state court and procured a receiver thereon.[1]

§ 388 *a*. When two different railways, incorporated in different states, have been legally consolidated into one corporation, which is operating the road as an entire and indivisible property through both such states, having mortgaged its entire line thus consolidated, a federal court in one of the states may appoint a receiver over the entire property. And in such case, the trustees being authorized by the mortgage to take possession of and to operate the road upon default, and having refused so to do after request by the bondholders, the relief may be granted upon a bill by the bondholders to enforce the trust and to foreclose the mortgage.[2]

§ 388 *b*. When in an action brought for the foreclosure of a railway mortgage, and seeking the appointment of a receiver, an order is made authorizing the president and directors of the company to continue in the possession and management of the road, under and subject to the orders of the court, to which they are required to report from time to time the condition of the road and its earnings and expenses, such order is to be construed as appointing them receivers

[1] Union Trust Co. *v.* Rockford, Rock Island & St. Louis R. Co., U. S. Circuit Court, Northern District of Illinois, 7 Chicago Legal News, 33. But see, *contra*, Wilmer *v.* A. & R. A. L. R. Co., 2 Woods, 409, where it was held that the priority of jurisdiction between the federal and state court should be determined, not by prior jurisdiction of the person or service of process, but by prior seizure of the property; and that, the receiver of the state court having taken possession before the appointment of the receiver by the federal court, such possession would not be disturbed by the latter court, although it had first acquired jurisdiction by the filing of the bill and by service of process.

[2] Wilmer *v.* A. & R. A. L. R. Co., 2 Woods, 409.

of the property, and they will be regarded as operating the road as officers of the court and not of the railway company.[1]

§ 389. When a receiver is appointed upon a bill to foreclose a mortgage executed by a railway company to secure its bonds, the right to a discharge of the receiver and a restoration of the property, upon payment of the mortgage indebtedness, is a clear, legal right, in no sense discretionary with the court, and a refusal to grant such right is judicial error.[2]

[1] *In re* Fifty-four First Mortgage Bonds, 15 S. C., 304; *Ex parte* Brown, 15 S. C., 518.

[2] Milwaukee & Minnesota R. Co. *v.* Soutter, 2 Wal., 510. See S. C., Woolworth's C. C., 49.

III. Functions and Duties of the Receiver.

§ 390. The usual practice of courts of equity, in appointing receivers over railway corporations, is to prescribe in the order of appointment the functions and duties of the receiver, which may be modified or extended from time to time by further order of court, as the exigencies of the case may require. In general, these duties comprise the operation and management of the road, the payment of current expenses, and the application of the residue of the earnings and receipts to the extinguishment of the indebtedness, to secure which the receiver was appointed.[1] The

[1] Brown *v.* New York & Erie Railroad, 19 How. Pr., 84; Kennedy *v.* St. Paul & Pacific R. Co., 2 Dill., 448; Vermont & Canada R. Co. *v.* Vermont Central R. Co. 46 Vt. 792. See, as to right or power of the receiver of a railway company, under the laws of New Jersey, to sell the property, rights and franchises of the company, free from all liens and incumbrances, Middleton *v.* New Jersey West Line R. Co., 10 C. E. Green, 306. As to the functions and liabilities of statutory receivers of railways appointed by the governor of the state pursuant to statute, in Tennessee, see State *v.* E. & K. R. Co., 6 Lea, 353; State *v.* McM. & M. R. Co., 6 Lea, 369. As to the effect of a consent decree terminating a receivership over a railway, the receivers still continuing in possession of and operating the road as managers, see Vermont & Canada R. Co. *v.* Vermont Central R. Co., 50 Vt., 500. See, also, Langdon *v.* Vermont & Canada R. Co., 53 Vt., 228; S. C., 54 Vt., 593. As to the liability of such managers to an accounting in a subsequent action brought by mortgage bondholders in a federal court, and as to the effect of a plea to such action of the pendency of the former proceedings in the state court, see Andrews *v.* Smith, 5 Fed. Rep., 833.

receiver is seldom authorized to enlarge the operations of the company, or to extend its line of road, his functions being usually limited to the management of the property in its existing condition for the protection of creditors, and subject always to the supervision of the court. And the better doctrine undoubtedly is, that the power of the court extends only to the custody and preservation of the property, and that it has no power to extend or to complete a railway enterprise, and for this purpose to raise money by charging the railway and its appurtenances with liens which shall supersede prior mortgages, without the consent of the holders of such mortgages.[1] In extreme cases, however, the courts have authorized the extension or completion of the road by the receiver, when necessary to its successful maintenance and operation,[2] or to prevent the forfeiture of valuable land grants and franchises which would result from the non-completion of the road within the time fixed by law.[3]

[1] Meyer *v.* Johnston, 53 Ala., 237. Manning, J., delivering the opinion of the court, says, p. 337: "It is in the exercise of the judicial function only that a court obtains jurisdiction between litigant parties of the cause in which it is authorized to take such control for the preservation of the property involved. And we are not aware of any principle of law or element of wise policy which would justify such court, after so getting possession, in laying aside its judicial character and engaging, however hopeful the scheme, in the completion of unfinished undertakings, and in raising money for this purpose, as the parties themselves could not, namely, by setting up liens which shall displace other and older liens, without the consent of the persons to whom they belong. . . If, therefore, the action of the chancellor, in this case, goes to the extent of taking the property of the defendant corporation in its hands for the purpose, through its appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and, to that end, of raising money by charging the railway and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion, no such power is vested or resides in any judicial tribunal."

[2] Miltenberger *v.* Logansport R. Co., 106 U. S., 286; Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 578.

[3] Kennedy *v.* St. Paul & Pacific R. Co., 2 Dill., 448; S. C., 5 Dill., 519. Dillon, J., says, 5 Dill., p. 525: "I assent in the fullest man-

And in such cases, the receivers have been authorized to issue debentures or certificates, to meet the expenses of construction, which were made a first lien upon the railway.[1] In general, however, the courts look with extreme jealousy upon any proposition for the extension of railway projects by their receivers, and, ordinarily, before such an expenditure is authorized by the court, there should be a reference to a master to determine the necessity for the contemplated improvement.[2]

§ 390 *a*. A receiver of a railway has no power, without the sanction of the court, to make contracts, as for the purchase of materials, which will bind the estate or fund which he represents. All contracts made by him are subject to the control of the court, which may modify or disregard them, as it sees fit; and persons contracting with him are chargeable with knowledge of his limited powers in this regard, and deal with him at the risk of their contracts not being approved by the court.[3] Nor is it his duty to inter-

ner to the proposition that a court of equity ought not to enter upon the work of either operating or building a railway, if this can possibly be avoided without the certain and great sacrifice of the rights and securities of the parties in interest. The original order in this case was made upon this principle, and upon the exceptional case which the record presented (Kennedy *v.* St. Paul & Pacific Railroad Co., 2 Dill., 448). It is not to be inferred from the report of that case that authority even to complete the building of an unfinished line of railway, and to issue debentures for that purpose, is to be conferred without an overwhelming and irresistible necessity. When such authority is conferred it ought to be guarded with the utmost care." And see the form of order in this case, 2 Dill., 448; 5 Dill., 527, and the subsequent proceedings in the case, 5 Dill., 530. As to the power of receivers of an insolvent railway in New York, to complete the construction of the road, and as to the right of abutting property owners to enjoin such construction when their damages have not been paid, see Moran *v.* Schaeffer, 27 Hun, 582.

[1] See cases cited *supra*.

[2] Hand *v.* Railroad Co., 10 S. C., 406.

[3] Lehigh C. & N. Co. *v.* Central R. Co., 35 N. J. Eq., 426. And it is also held in New Jersey, that when two insolvent railway companies are in the hands of receivers appointed by the same court, the court may, upon the application of either receiver, modify a contract made

fere with or to prevent the construction of a rival line of railway, even though such construction might result in diminishing the earnings of the road under his control. He can not, therefore, be allowed credit in his accounts for money expended in endeavoring to defeat a subsidy in aid of the construction of a parallel road.[1]

§ 391. Where, upon a bill filed by bondholders for the foreclosure of a railway mortgage securing their bonds, receivers of the railroad are appointed *pendente lite*, and hold the property of the road only provisionally and until the ultimate determination of the cause, they are not authorized to appropriate the property and assets of the corporation and its earnings to the payment of debts of the company previously incurred by contract. The contract obligation, although binding upon the railway company, does not constitute a lien upon its property or franchises, and the appropriation by the receivers of funds of the company to the payment of such an obligation would be, in effect, to give a preference to such indebtedness, and would be inconsistent with the purposes for which the receivers were appointed.[2]

by the companies before their insolvency for the use by one company of the tracks and terminal facilities of the other. *In re* N. J. & N. Y. R. Co., 29 N. J. Eq., 67. But the exercise of such power may well be challenged as impairing the obligation of the contract. As to the extent to which covenants of the receiver are binding upon subsequent purchasers of the railway, see Martin *v.* N. Y., S. & W. R. Co., 36 N. J. Eq., 109.

[1] Cowdrey *v.* G., H. & H. R. Co., 93 U. S., 352.

[2] Ellis *v.* Boston, Hartford & Erie R. Co., 107 Mass., 1. And in this case it is said by the court, Wells, J., p. 28: "They (the receivers) continue the operation of the road and the conduct of its business, because this is essential to its proper preservation. They may fulfill the contracts of the corporation so far as beneficial. They will not pay its debts, nor fulfill contracts which are burdensome or tend to diminish the value of the property in their control, unless such contracts are charged as incumbrances upon the property, or are necessary to its proper preservation and security. They are entitled to repayment of their reasonable expenses and charges, in preference to all other claims upon the property of whatever nature." See, also, Brocklebank *v.* East London Railway, 12 Ch. D., 839.

So where the mortgage bondholders of a railroad have obtained a receiver, in an action for the foreclosure of their mortgages, and by his order of appointment, the receiver is authorized to pay the amounts due and maturing for materials and supplies about the operation and for the use of the road, the court will incline to limit the construction of the order to the payment of such obligations as are necessary to keep the road in running order, and will not, therefore, extend it so far as to direct the receiver to pay old obligations incurred several years previously, such demands being regarded as secondary to the rights of the mortgagees.[1]

§ 392. The duties of the receiver of a railway, entrusted with the management and operation of the road, being very different from and far more responsible than those of a passive receiver, appointed merely to collect and hold money, a somewhat wider discretion is allowed him in the matter of expenditures necessary to operate the road. And it may be said in general, that all outlays made by him in good faith, in the ordinary course of the business of the road, with a view to advance and promote its interests, and to render it profitable and successful, may be allowed him in passing his accounts. Such outlays may include not only keeping the road and its buildings and rolling stock in repair, but also providing such additional accommodations and stock as the necessities of the business may demand, always referring to the court or master for advice and authority when any considerable outlay is required. Thus, charges for rebate on freight; for horses and wagons for the delivery of freight; for drayage and wharfage; for the purchase of scales; for office room; for advertising the accommodations of the road; and for interest paid to a bank for loans of money, have all been allowed.[2] So money borrowed by

[1] Brown *v.* New York & Erie Railroad, 19 How. Pr., 84.

[2] Cowdrey *v.* The Railroad Co., 1 Woods, 331. "It may be laid down as a general proposition," says Mr. Justice Bradley, p. 336, "that all outlays made by the receiver in good faith, in the ordi-

the receiver for the necessary maintenance and operation of the road, may be repaid out of the income of the receivership.[1] And rebates upon freight allowed by the receiver, which are not inequitable or against public policy, may be allowed and paid out of the receiver's earnings.[2]

§ 393. It is the clear duty of the court appointing a receiver over a railway to afford him all necessary protection in the performance of his official duties. And where the order of appointment directs the receiver to operate and manage the road, subject to the decrees and orders made in the cause, and subject to the further direction of the court, since the successful management of the road depends upon the control of the receiver over its income and earnings, any attempt by other parties to divert such earnings, or to divest the receiver of his control over them, will be enjoined by the court, when the parties making such attempt are within its jurisdiction, even though they are proceeding to

nary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock, in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may involve a considerable outlay of money in lump. And except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed."

[1] *Ex parte* Carolina National Bank, 18 S. C., 289.

[2] *Ex parte* Benson, 18 S. C., 38.

divert the earnings from the receiver's control by suit in another state. In such a case, the court, in the protection of its receiver, does not operate by its injunction upon the court in the other state in which the action is pending, but only operates *in personam* upon the parties within its own jurisdiction, and restrains them from interfering with or diverting the income and funds properly belonging to the custody of the receiver.[1]

§ 394. As regards rights of action vesting in a receiver of a railway corporation by virtue of his appointment, he must, in their enforcement, pursue the appropriate remedies provided by law for that purpose. And when he is authorized to take possession of the bills, bonds, notes and other evidences of indebtedness belonging to the company, with full power and authority to sue for and collect all money due thereon, if he seeks to enforce payment of a subscription due from a subscriber to the capital stock of the company, he must bring an action at law, the right being of a legal nature, and he will not be allowed to maintain a bill in equity.[2] And since proceedings for the foreclosure of a mortgage, given by a railway company to secure its bonds, are regarded as *in rem*, in that they seek to reach such property of the corporation as was mortgaged to secure its bonds, the right of a receiver appointed therein extends only to the specific property which is the subject of the litigation and covered by the mortgage, being necessarily subject to the same limitations as the right of the bondholders themselves. The receiver, therefore, can not maintain an action against the superintendent of the railway company for the recovery of money held by him, which had accrued from the earnings of the road before the receiver was appointed, where the mortgage itself did not attach to such earnings.[3]

[1] Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792.

[2] Freeman *v.* Winchester, 18 Miss., 577.

[3] Noyes *v.* Rich, 52 Me., 115.

IV. Preferred Debts.

§ 394a. The most important and most difficult questions connected with railway receiverships are those which pertain to indebtedness incurred in the management and operation of the railway, and the extent to which certain classes of pre-existing debts may be preferred in payment, either out of the income of the receivership, or out of the proceeds of foreclosure, as against the claims of mortgage bondholders and other creditors. That mere contract debts of the railway company, as for labor, materials and supplies, incurred prior to the appointment of a receiver, and unsecured by any lien upon the property, can, through the aid of a court of equity, be given priority over antecedent mortgages, would seem to be a proposition wholly indefensible upon sound legal reasoning. The allowance of such preference plainly impairs the obligation of the mortgage contract, and in practice frequently absorbs much of the mortgage security. Nevertheless the doctrine of the courts upon this subject, although frequently criticised by the profession and in vigorous and able dissenting opinions from the bench, is so strongly intrenched in authority that it can

no longer be questioned. And it only remains to consider what may now be regarded as well established rules applicable to this class of questions, with the reasoning of the courts upon which such rules are founded.

§ 394 *b*. As regards indebtedness incurred by the receiver himself in the maintenance, operation and necessary repairs of the road while in his custody, but little difficulty is experienced in practice, and the power of a court of equity to create such debts through its receiver, and to give them preference over the lien of the mortgage indebtedness, is well established.[1] The exercise of this power rests upon the obvious principle, that the court having undertaken the management of the railway at the request and for the benefit of the mortgage creditors, all necessary expenses incurred in such management are a prior charge upon the fund or property, and constitute, in effect, a part of the necessary costs of the litigation. It is, therefore, customary in the order appointing the receiver, to direct him to pay, out of the earnings of the road, all necessary expenses of management and operation. Such subsequent orders with reference to this class of debts are from time to time made during the progress of the cause as the exigencies of the case may require, and if the receiver's income proves insufficient to satisfy his indebtedness, the residue is usually paid out of the proceeds of the foreclosure sale, before a distribution is made to the mortgage bondholders. Nor is such expenditure by the receiver limited to the actual operation and management of the property; and reasonable expenses incurred by him in completing the road for operation, thereby preserving the property and rendering it productive for the benefit of the mortgage bondholders, have been allowed priority over other claims against the company, including those of the bondholders.[2] And when, under authority of the court, the receiver has constructed a branch line of road

[1] Miltenberger *v.* Logansport R. Co., 106 U. S., 286.

[2] Hale *v.* Nashua & Lowell Railroad, 60 N. H., 333. See, also, Miltenberger *v.* Logansport R. Co., 106 U. S., 286.

out of the income of the receivership, thereby largely increasing the revenues and profits of the road, and no complaint is made by the parties in interest until more than two years after such action, the court will not entertain objections to such expenditure.[1] So damages for goods lost in transportation, and for injury to property while the road is operated by the receiver, are a proper charge upon his earnings before the bondholders are entitled to share therein.[2] So rentals due for a line of road operated by the company under lease, the operation of which the receiver is authorized to continue under the lease, may be paid out of the receiver's income.[3] And when the receiver continues to use a line which had been leased to the company, with the full knowledge and acquiescence of the mortgage bondholders, the payment of a fair rental for the use of such line and for supplies and materials in its operation may be enforced out of the proceeds of foreclosure, prior to distribution among the bondholders.[4] But to warrant the payment of the receiver's operating expenses, as for money advanced, supplies and damages incurred, out of the *corpus* of the mortgaged property in preference to the bondholders, such priority must be specially authorized by the court, and it can not be allowed merely under an order authorizing him to pay operating expenses out of income.[5]

[1] Gibert *v.* W. C., V. M. & G. S. R. Co., 33 Grat., 586. But when the receiver is authorized by the court to construct an additional track or extension, to be paid for out of surplus income, the order reserving a lien upon such track as security for the persons furnishing material and money therefor, and such branch is afterward sold with the road as an entirety in the foreclosure proceedings, claims for its construction will not be paid in full out of the proceeds of sale, but will be prorated in the proportion which the value of the extension bears to the value of the entire road, considered with reference to the purchase money of the whole. Hand *v.* Savannah & Charleston R. Co., 17 S. C., 219.

[2] Cowdrey *v.* G., H. & H. R. Co., 93 U. S., 352.

[3] Woodruff *v.* Erie R. Co., 93 N. Y., 609.

[4] Miltenberger *v.* Logansport R. Co., 106 U. S., 286.

[5] Hand *v.* Savannah & Charleston R. Co., 17 S. C., 219.

§ 394 *c*. With regard to indebtedness incurred by a railway company for labor, materials, equipment and supplies before the appointment of a receiver, the right to priority of payment out of the income of the receivership has frequently, although not always, been based upon a diversion of current income from the payment of current indebtedness. The duty of the railway company being to apply its current income to the payment of obligations incurred in the daily operation and management of the road, before applying such income for the benefit of mortgage bondholders, a diversion of such income, as by payment of bonded indebtedness, or by permanent improvement of the property for the benefit of the bondholders, will justify the court in restoring to such unsecured creditors from the receiver's income what has been improperly diverted by the company for the benefit of bondholders. The mortgagee, in accepting his security, is regarded as having impliedly agreed that the current debts of the company incurred in the ordinary course of its business shall be paid out of its receipts before he has any claim upon the income. And the court, in directing such payment out of the receiver's income, only does in effect what the company itself should have done had no receiver been appointed. Whenever, therefore, the current income of the road has been diverted by the company from the payment of debts for supplies, materials and labor, and has been appropriated for the benefit of mortgage bondholders, either by the payment of interest or by the permanent betterment of the property, the labor and supply creditors may be allowed priority of payment out of the receiver's income.[1] It is obvious that the

[1] Fosdick *v.* Schall, 99 U. S., 235; Williamson's Adm'r *v.* W. C., V. M. & G. S. R. Co., 33 Grat., 624. See, also, Burnham *v.* Bowen, 111 U. S., 776; Turner *v.* I., B. & W. R. Co., 8 Biss., 315. Fosdick *v.* Schall, 99 U. S., 235, is regarded as the leading case upon the subject, and although what is there said upon the question of diversion is *obiter*, the opinion of the court seems to have been intended to establish the rule for future cases, and has so been generally accepted. Two questions were presented: 1st, whether the lien of railway mort-

allowance of such claims does not rest upon any lien in the technical sense, but rather upon the exercise of the equita-

gages attached to after-acquired cars; and 2d, whether the payment of rentals for such cars during the receivership, and for six months prior thereto, out of the fund in court, it not appearing that there were any funds except those resulting from the foreclosure sale, was warranted. From the case as reported, it does not appear that income had been diverted, either by the company or by the receiver, and the question of diversion does not appear to have been argued by counsel. Waite, C. J., says, p. 251: "As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. . . The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. . . We think, also, that, if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business."

It has generally been supposed that Fosdick *v.* Schall was the first reported case upon the question of diversion of income as the ground

ble powers of the court in dealing with property of a peculiar character, and under circumstances which, until recently, have been without precedent in the history of litigation.[1] Nor is it necessary that the diversion of income should have occurred before the appointment of the receiver; and where, during the receivership, current income is applied for the benefit of the mortgagees, as in payment for additional grounds and rolling stock which inure to their benefit, and which are sold as a part of the mortgaged property, debts of the company for supplies may be made a charge upon the property acquired under the foreclosure, which may be sold to satisfy such indebtedness.[2] But the allowance of

for awarding preference to labor and supply creditors. But the doctrine had been previously recognized and followed in some of the circuits, and it is plainly indicated in the earlier reported opinion of Drummond, J., in Turner *v.* I., B. & W. R. Co., 8 Biss., 315. Upon the question of diversion of current income by the receiver to the betterment of the mortgaged property, as entitling a claimant for personal injuries sustained while the road was operated by the receiver to payment out of the proceeds of such property, see Ryan *v.* Hays, 62 Tex., 42.

[1] Opinion of Drummond, J., in Turner *v.* I., B. & W. R. Co., 8 Biss., 315.

[2] Union Trust Co. *v.* Souther, 107 U. S., 591; Burnham *v.* Bowen, 111 U. S., 776. Waite, C. J., says, p. 782: "But it is further insisted that, even though the court did err in using the income of the receivership to pay the fixed prior charges on the mortgaged property, and thus increased the security of the bondholders, there is no power now to order a sale of the property in the hands of the trustees to pay back what has thus been diverted. In Fosdick *v.* Schall, p. 245, it was said that if in a decree of foreclosure a sale is ordered to pay the mortgage debt, provision may be made for a restoration from the proceeds of the sale of the fund which has been diverted, and this clearly because, in equity, the diversion created a charge on the property for whose benefit it had been made. Here the parties interested preferred a decree of strict foreclosure, which the court gave, but in giving it saved the rights of all intervenors, and continued the case for the final determination of all such questions. The present appeal is from a decree which grew out of this reservation. As the diversion of the fund created in equity a charge on the property as security for its restoration, it is clear that if the mortgagees prefer to take the property under a decree of strict foreclosure, they take it subject to the charge in favor of the current debt creditor whose money they have got, and that he can insist on a sale of the property for his benefit,

such current debt claims, to be paid out of net income, does not necessarily entitle them to payment out of the *corpus* of the property, and such preference will not be allowed unless special equities are shown entitling the claimants to priority over the mortgage indebtedness.[1]

§ 394 *d*. The right to priority of payment, of the class of claims under consideration, has been recognized and the preference allowed independent of any question of diversion of income, and solely upon the necessity for preserving the property and continuing its operation.[2] Thus, the receiver has been authorized to pay arrears due for operating expenses for a period of ninety days prior to his appointment,

if they fail to make the payment without." See, also, Langdon *v.* Vermont & Canada R. Co., 54 Vt., 593, to the point that debts incurred by managers of a railway, after their discharge as receivers proper, under a consent decree, constitute a lien upon the property in the nature of an equitable mortgage, which may be enforced by strict foreclosure.

[1] Blair *v.* St. L., H. & K. R. Co., 22 Fed. Rep., 471. As to the length of time prior to the receivership within which current debt claims must have accrued to entitle them to priority of payment out of the receiver's income, no fixed rule has been determined by the courts, and from the nature of the case none can be. In the United States circuit court for the seventh circuit, the time has frequently been fixed at six months, and this has been followed in other circuits. The only known reason for limiting the time to six months in the seventh circuit is by analogy to a statute of Illinois giving a statutory lien upon railways for labor, materials and supplies furnished, provided suit be brought within six months after completion of the contract. See, upon this point, opinion of Drummond, J., in Turner *v.* I., B. & W. R. Co., 8 Biss., 315. But this limitation has not been generally adopted, and such claims have been allowed priority, although accruing one or more years before the receivership. See the authorities as to time reviewed in note to Blair *v.* St. L., H. & K. R. Co., 22 Fed. Rep., 475. See, also, Central Trust Co. *v.* Texas & St. Louis Railway, 22 Fed. Rep., 135. As to the extent to which the services of counsel necessary to the management of the road are entitled to priority out of the proceeds of foreclosure, see Bayliss *v.* L., M. & B. R. Co., 9 Biss., 90.

[2] Miltenberger *v.* Logansport R. Co., 106 U. S., 286; Taylor *v.* P. & R. R. Co., 7 Fed. Rep., 377; Atkins *v.* Petersburg R. Co., 3 Hughes, 307. See, *contra*, Denniston *v.* Chicago, Alton & St. Louis R. Co., 4 Biss., 414.

as well as amounts due to other railway companies for materials and repairs and for ticket and freight balances before the receivership. And these allowances, together with sums due for rolling stock purchased by the receiver, and for completing an additional line and bridge as part of the main line of road, have been given priority over the mortgage indebtedness, to be paid out of the earnings of the receiver, or, if necessary, out of the proceeds of foreclosure.[1] So where employees of the company were threatening to strike because of non-payment of wages, and many of them had brought attachment suits and recovered judgments against the company, advances to the company to pay such wages, with an agreement for repayment out of the first net earnings, have been allowed priority out of receiver's income.[2]

[1] Miltenberger *v.* Logansport R. Co., 106 U. S., 286. Mr. Justice Blatchford says, p. 311: "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result in case of non-payment, the general consequence involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise and entitle them to be made a first lien." To the same effect see Barton *v.* Barbour, 104 U. S., 126.

[2] Atkins *v.* Petersburg R. Co., 3 Hughes, 307. In this case, the advances for wages were made nearly two years before the receivership.

So claims for materials and supplies, such as car springs and spirals and supplies furnished to the machinery department, before the appointment of the receiver, and used by him in the management and operation of the road, may be paid in full out of the net income of the receivership in preference to the demands of mortgage bondholders. And the net earnings of a railway, while in the hands of a receiver appointed in behalf of mortgagees, are not necessarily or exclusively the property of the mortgagees, but are subject to the disposal of the court in the payment of claims having superior equities.[1]

§ 394 *e*. Preference has also been given in the payment out of receiver's income of operating expenses incurred by the company, as for labor, supplies and equipment in the operation of the road, upon the ground that the mortgagee, having invoked the extraordinary aid of a court of equity by the appointment of a receiver in aid of the foreclosure, the court may impose such just and reasonable conditions to the relief sought as the exigencies of the case may require. The mortgagee usually having the right under the terms of his mortgage to take possession after default, he may, if he sees fit, invoke the ordinary legal remedies to obtain such possession and to enforce his lien. If, instead of so doing, he seeks the extraordinary remedy of a receiver to manage the property, he must submit to such conditions as the court may see fit to impose with reference to the payment of operating expenses already incurred, out of the income of the receivership. And the fact that the mortgagee has suffered the railway company to continue in the possession and management of the property for a considerable period of time after default, thereby permitting new obligations to be incurred

In Skiddy *v.* A., M. & O. R. Co., 3 Hughes, 320, the same court ordered payment by the receivers of wages due to employees for eight months prior to the receivership, but refused payment of such claims which had been assigned to third persons, and also refused payment for rails and supplies furnished to the company.

[1] Hale *v.* Frost, 99 U. S., 389.

for operating expenses and for the maintenance of the property, affords additional ground for requiring such obligations to be discharged out of the income of the receiver as a condition to his appointment.[1] And in this class of cases, the right to preference is regarded as attaching to the debt or demand itself, and not to the person of the creditor. It therefore passes by assignment, and the same preference may be allowed to an assignee of the original demand.[2]

§ 394 *f*. Questions concerning the payment out of receiver's income of rentals due upon rolling stock leased by the company prior to the receivership are governed by substantially the same rules which have been discussed in the preceding sections. These questions are usually presented in cases where the company had leased rolling stock under what are known as car-trust leases, or other evidences of conditional sale, the lessor or vendor retaining the title to or a lien upon the rolling stock, until the stipulated payments are fully made by the company. In such cases, the vendor's title or lien is unaffected by the appointment of the receiver, that officer acquiring no better title to the rolling stock than that of the company. If the receiver continues to use such rolling stock, the owner or lessor is entitled to just compensation for its use, to be paid out of the receiver's earnings, such payment being, in effect, the application of current income to the payment of current expenses.[3] Whether, in the event of a deficiency of receiver's income, such car rentals, accruing either before or during the receivership, are entitled to payment in full out

[1] Union Trust Co. *v.* Souther, 107 U. S., 591; Douglass *v.* Cline, 12 Bush, 608. See, also, Fosdick *v.* Schall, 99 U. S., 235; Burnham *v.* Bowen, 111 U. S., 776. As to the right to net earnings in such a case, as between mortgage bondholders and various classes of unsecured creditors, see Newport & Cincinnati Bridge Co. *v.* Douglass, 12 Bush, 673.

[2] Union Trust Co. *v.* Walker, 107 U. S., 596; Burnham *v.* Bowen, 111 U. S., 776. See, *contra*, Skiddy *v.* A., M. & O. R. Co., 3 Hughes, 320.

[3] Fosdick *v.* Schall, 99 U. S., 235; Myer *v.* Car Co., 102 U. S., 1; Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq., 37.

of the proceeds of foreclosure sale, has been said to be dependent upon whether there has been a diversion of current income from current expenses during the receivership.[1] Upon principle, however, it is impossible to discriminate between claims of this character, and those for wages, materials and other operating expenses, which, as already shown, have been frequently allowed priority out of receiver's income, or have been paid out of the sale of the property, in the absence of any evidence of diversion of income, upon other equitable considerations addressing themselves to the discretionary powers of the court.[2] But if the receiver's income is sufficient to pay for additional rolling stock necessary to the operation of the road, the court will not permit him to make a loan by the creation of a car trust to procure such rolling stock, in order that current income may be applied to interest upon bonded indebtedness.[3] And if cars held by the company under conditional sales are used by the receiver and sold under the foreclosure decree,

[1] Fosdick *v.* Schall, 99 U. S., 235.

[2] Miltenberger *v.* Logansport R. Co., 106 U. S., 286. In this case, the receiver having made an adjustment with the owners of rolling stock held under conditional sales to the company, the nature of which is not clearly set forth in the case as reported, and having purchased rolling stock, these allowances, with others, were awarded priority over the mortgage indebtedness, to be paid out of the receiver's earnings, or, if necessary, out of the proceeds of foreclosure. And in Central Trust Co. *v.* T., D. & B. R. Co., unreported, in the United States circuit court for the seventh circuit, at Indianapolis, June, 1885, it was ordered, Judges Gresham and Woods concurring, that rentals of rolling stock held by the company, under car-trust leases, should, for the period of use by the receiver, be paid as a first lien, out of receiver's income or out of the proceeds of foreclosure sale, before distribution to mortgage bondholders, and that rentals for six months prior to the receivership should be paid out of the net income of the receiver. In Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq., 37, it was held that lessors of rolling stock leased to a railway company were not entitled to payment in full of the rent reserved in the lease, at the hands of the receivers, unless the court should find that such payment was for the best interests of the trust represented by the receivers.

[3] Taylor *v.* P. & R. R. Co., 9 Fed. Rep., 1.

the vendor may be paid in full out of the proceeds of such sale, his lien upon the cars being paramount to that of the mortgagees.[1] So if rolling stock is purchased by the receiver out of the earnings of the road and sold under the foreclosure, the mortgage covering after-acquired property, the purchaser at the sale is entitled to such rolling stock as against the mortgagees.[2]

§ 394*g*. The income of a railroad while operated by receivers appointed in behalf of mortgage bondholders is regarded as part of the mortgaged property in the sense that it is to be applied to expenses of administration and management, and to the liens and trusts with which it is charged. And until such expenses and liens have been satisfied, judgment creditors of the railway company are not entitled to payment out of the income.[3] But judgment creditors of the company, who are entitled to payment out of the funds in the hands of or due to the company when the receiver is appointed, may, if such funds are otherwise appropriated by the receiver, be paid in full out of the receiver's income in preference to mortgage bondholders.[4] Whether a judgment against the receiver himself is payable out of the proceeds of foreclosure would seem to depend rather upon the nature of the cause of action than upon the fact that the demand has been reduced to judgment. If the cause of action grows out of materials supplied for the necessary operation of the road for the benefit of the mortgagees, as for rental of and repairs to rolling stock used by the receiver, a judgment recovered against him in a suit brought by leave of the court appointing him, and in a court of competent jurisdiction, is conclusive against the bondholders and may be paid out of the proceeds of foreclosure.[5]

[1] Fosdick *v.* Car Company, 99 U. S., 256.

[2] Strang *v.* M. & E. R. Co., 3 Woods, 613. But it is held in the same case, that the purchaser is not entitled to a balance of income remaining in the receiver's hands, such income belonging to the creditors of the company in the order of their priorities.

[3] North Carolina R. Co. *v.* Drew, 3 Woods, 692.

[4] Gibert *v.* W. C., V. M. & G. S. R. Co., 33 Grat., 645.

[5] Turner *v.* I., B. & W. R. Co., 8 Biss., 527.

But if the judgment is for personal injuries sustained by a passenger upon the road while operated by the receiver, it is held not to be entitled to payment out of the fund arising from the foreclosure. Such a judgment, it is held, is no more entitled to be made a lien upon the property or fund, as against the mortgagees, than if the injury had been sustained while the road was operated by the company, the creation of such lien not being necessary to the operation of the road for the benefit of the bondholders in whose behalf the receiver is appointed.[1] Such a judgment may, however, be paid out of the net income of the receivership in preference to the claims of the bondholders to such income.[2]

§ 394 *h*. Claims of general creditors of a railway company, incurred prior to the receivership, and which do not fall within the class of operating expenses embracing labor, supplies, materials or equipment, and which do not, therefore, have any special equities entitling them to payment out of current income, will not be preferred out of the earnings of the receiver, or out of the proceeds of the foreclosure sale. Among these may be classed claims for salaries of officers of the company, money loaned to the company, claims of contractors for construction,[3] and money advanced to complete the construction of the road, which will not be preferred when it is not shown that such advances were made at the request of or by reason of the promises of the bondholders.[4] So a cause of action against a railway company, growing out of the destruction of property caused by fire escaping from a locomotive, does not fall within that class of operating expenses which have been allowed priority, and can not be enforced against the receiver.[5]

§ 394 *i*. Statutory liens upon the property of a railway company, given to creditors furnishing labor and supplies,

[1] Davenport *v.* Receivers, 2 Woods, 519. And see Hopkins *v.* Connel, 2 Tenn. Ch., 323.

[2] *Ex parte* Brown, 15 S. C., 518; Klein *v.* Jewett, 26 N. J. Eq., 474.

[3] Addison *v.* Lewis, 75 Va., 701.

[4] *In re* Kelly, 5 Fed. Rep., 846: S. C., 10 Biss., 151.

[5] Hiles *v.* Case, 14 Fed. Rep., 141.

may be enforced and the rights of such creditors protected, notwithstanding the appointment of receivers in foreclosure proceedings against the company. And when such creditors are entitled, by statute, to an attachment against the rolling stock and personal property of the railway, the rights of the mortgagees being subordinated by the statute to those of the attaching creditors, they may enforce their rights after the appointment of receivers against such property, and if that shall prove insufficient they may be preferred in payment out of the net income of the receivers.[1] So when the receiver has been appointed by a federal court, creditors claiming statutory liens upon the property may be permitted to present their claims in the suit in which the receiver was appointed, with like effect as if filed in the courts of the state. And creditors claiming an equitable lien under demands arising in other states, where no statutory lien is given, may establish their claims in the same manner against the fund in the hands of the receiver.[2] But whether interest shall be paid upon demands which are allowed by the court out of the funds of the receivership is regarded as depending upon the nature of the cause of action itself, rather than upon the fact that it has been reduced to judgment. And where claims for damages resulting from the operation of the railway are reduced to judgment in actions against the corporation, and are afterward allowed as claims against the receiver's funds, they are not entitled to interest, since as against the fund they are treated as divested of their character as judgments and rest upon the equities of the original cause of action, the damages in which were unliquidated.[3]

[1] Poland *v.* Railroad Co., 52 Vt., 144.

[2] Blair *v.* St. L., H. & K. R. Co., 19 Fed. Rep., 861. But persons claiming an equitable lien for advances upon rolling stock in use by the receiver should not be heard, or their rights determined, in advance of a final hearing as to all claims upon such property, when conflicting claims and liens are asserted by different parties in interest. Receivers *v.* Wortendyke, 27 N. J. Eq., 658.

[3] *Ex parte* Brown, 18 S. C., 87.

V. Actions against the Receiver.

§ 395. It has elsewhere been shown, that, as to rights of action which may be maintained against receivers, they are, in general, the same which might have been maintained against the person to whose estate and rights the receiver succeeds. And in conformity with this general doctrine, when the affairs of a railway company have passed into the hands of receivers, who are operating the road under the direction of the court, having exclusive charge of its management and of the employment of operatives and employees, the entire control of the company having passed to the receivers as fully as it was before exercised by the officers of the road, the receivers may be held answerable in their official capacity for injuries sustained, in the same manner that the corporation would have been liable. An action will, therefore, lie against such receivers in their official capacity, leave of the court being obtained, to recover for personal injuries sustained by reason of the negligent management of the road. And in determining the liability of the receivers, in such cases, upon such questions as negligence of principal and of agent, acts of co-employees, responsibility for defective machinery, and kindred questions, the same principles are applicable which govern this class

of actions when instituted against railways themselves.[1] In such an action, the receivers can not exempt themselves

[1] Meara's Administrator *v.* Holbrook, 20 Ohio St., 137; Potter *v.* Bunnell, id., 159; Klein *v.* Jewett, 26 N. J. Eq., 474; Erwin *v.* Davenport, 9 Heisk., 44; *Ex parte* Brown, 15 S. C., 518; *Ex parte* Johnson, 19 S. C., 492. See, also, Ohio & Mississippi R. Co. *v.* Davis, 23 Ind., 553; Nichols *v.* Smith, 115 Mass., 332; Sloan *v.* Central Iowa R. Co., 62 Iowa, 728; Blumenthal *v.* Brainerd, 38 Vt., 402; Paige *v.* Smith, 99 Mass., 395. But see, *contra*, Henderson *v.* Walker, 55 Ga., 481; Thurman *v.* Cherokee R. Co., 56 Ga., 376; Cardot *v.* Barney, 63 N. Y., 281. Meara's Administrator *v.* Holbrook, 20 Ohio St., 137, was an action by an administrator, brought by leave of court against the receivers of a railroad, for personal injuries alleged to have been sustained by the deceased, who was a laborer on the railroad, in the employ of defendants, in attempting to couple two cars in use upon the road. The cause of action was set forth in a petition and an amended petition, to both of which demurrers were filed. The demurrers were sustained in the court below and judgment was rendered against the plaintiff. On error to the supreme court, the judgment was reversed. The court, Day, J., observe, p. 147: "The demurrers admit the truth of the allegations contained in the petitions. It is averred in each of them that Meara was employed by the receivers as a laborer on the railroad. It is, therefore, not questioned but that his position as such was subordinate to the managing agents and superintendents of the receivers. It is averred in each of the petitions that the death of Meara was caused while engaged in the business of the receivers, without any fault of his own. In the original petition it is alleged to have been caused by the negligence of the agents and superintendents of the receivers; and, in both the amended petitions, by the negligence of the receivers themselves. The questions are, therefore, presented, whether a receiver operating a railroad is answerable in his official capacity for an injury to his servant, sustained, while in his employment, by reason of the negligence of the receiver, or the negligence of his agents in a position superior to that of the servant. On the strength of the authorities already cited, as well as the reason and justice of the case, we think the question of his liability, in an action against him as receiver, should be determined by the same rules and principles that are applicable to persons or corporations engaged in the business of operating a railroad. . . Nor would a recovery against him, and satisfaction out of the fund properly applicable to that purpose, work a greater hardship to the creditors and stockholders of the company than that always sustained by them where the company itself is made liable for like grievances when it operates its own road. On the contrary, if the receiver be not held officially chargeable, in many

from liability on the ground that they are public officers, and as such, not responsible for the negligence of their employees, nor on the ground that they are agents and trustees; for, as to the public and as to their employees, the receivers occupy neither of these capacities, there being no tangible principal behind them who can be held liable in such actions.[1] And since they exercise the functions and powers of common carriers, they can not escape corresponding duties and liabilities.[2]

§ 395 *a*. It is to be borne in mind that the general doctrine elsewhere discussed,[3] requiring leave of court to be granted before suit can be brought against a receiver, applies with equal force in actions against receivers of rail-

instances they might gain an advantage, by his operating the road, over what they would have if the company conducted its own business, subject to its incidental losses. Nor does it follow, if the receiver be held answerable as the company would have been if it had operated the road, that he would be relieved from accountability to his *cestui que trusts* for losses they might sustain through his personal misconduct or negligence. In every view, therefore, it accords with sound principle and reason, that a receiver, exercising the franchises of a railroad company, should be held amenable in his official capacity to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road. In determining the case before us, then, it only remains for us to apply the ordinary principles controlling cases of this class. Where a subordinate servant is injured, without his own fault, while engaged in the business of his employment, by reason of the negligence of his master or his agents, the master is liable to him in damages. Fifield *v.* Northern Railroad, 42 N. H., 225; Brydon *v.* Stewart, 2 Macq. H. L., 30; Railroad *v.* Keary, 3 Ohio St., 201. Meara was the servant of the receivers and was injured, according to the cases made in the several petitions demurred to, either through the negligence of the receivers, or that of their agents in a position superior to that of Meara. The receivers are, therefore, liable. It follows that the court of common pleas erred in sustaining the demurrers of the receivers to each of the petitions, and that the judgment in their favor must, therefore, be reversed."

[1] Meara's Administrator *v.* Holbrook, 20 Ohio St., 137. See, *contra*, Cardot *v.* Barney, 63 N. Y., 281.

[2] *Ex parte* Brown, 15 S. C., 518.

[3] Chapter VIII, subdivision V, *ante*.

ways.[1] And it rests wholly within the discretion of the court appointing the receiver, upon leave being asked to bring an action against him, to grant permission to bring an independent suit, or to determine the matter upon petition in the cause in which he was appointed, directing, if necessary, an issue to be tried by a jury as to the damages sustained.[2] The general usage is to determine all demands against a receiver upon petition in the original cause, and this practice is both more expeditious and more economical than by resort to an independent action. And the right to a trial by jury, in such cases, is treated as wholly discretionary with the court, which may direct the issues of fact to be tried by a jury if it sees fit, or may refer them to a master for determination.[3] In New Jersey, however, it is regarded as the better practice, when the cause of action is in tort, to grant leave to bring an independent action at law against the receiver, a court of equity not being the proper forum for determining questions of tort and of damages.[4]

§ 395 *b*. Notwithstanding the general doctrine, holding receivers of railways to the same liabilities as common carriers as the companies themselves, has the clear weight both of principle and of authority in its support, it has not been uniformly followed in New York, and some inconsistency and much uncertainty are observable in the decisions in that state upon the question under consideration. Thus, it

[1] Barton *v.* Barbour, 104 U. S., 126, affirming S. C., 3 MacArthur, 212; Melendy *v.* Barbour, 78 Va., 544; Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704. See, *contra*, Kinney *v.* Crocker, 18 Wis., 74; St. Joseph & Denver City R. Co. *v.* Smith, 19 Kan., 225; Blumenthal *v.* Brainerd, 38 Vt., 402; Paige *v.* Smith, 99 Mass., 395.

[2] Melendy *v.* Barbour, 78 Va., 544; Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704.

[3] Kennedy *v.* I., C. & L. R. Co., 3 Fed. Rep., 97; S. C., 2 Flippin, 704.

[4] Palys *v.* Jewett, 32 N. J. Eq., 302. But it is held in the same case, that where the person seeking damages for injuries sustained while the road is operated by a receiver submits his demand by petition in the equity suit, and both parties submit to a hearing in this form, the judgment of the court below may be reviewed upon the merits on appeal.

has been held that the receiver occupies a position analogous to that of a public officer, charged with duties of a public nature, in the performance of which he is compelled to act in part through others, and that it would be a great hardship to impose upon him the responsibilities which attach to persons acting through agents appointed for their own convenience or profit. And upon these considerations, it has been held that he is not liable to passengers for injuries sustained by the negligence of his employees, when no personal neglect is imputed to the receiver in the selection of such employees, the doctrine of *respondeat superior* not being applicable in such cases.[1] The same court having previously held that, when a railroad is operated by a special receiver appointed in bankruptcy proceedings, the company is not liable in an action for damages sustained through the negligence of the receiver's employees,[2] in the light of these decisions there would seem to be absolutely no remedy in New York, to one sustaining loss or damage through the operation of a railroad by a receiver. But in a later case, it is held that a receiver of another state, who, under the authority of the court appointing him, operates a railroad in New York as lessee, having covenanted in the lease to assume all obligations of the lessor company as a common carrier or otherwise, is liable to an action in New York for damages for injuries sustained by an employee upon such road by reason of defective machinery. In such case, it is held that his liability is not affected by the fact that he is a receiver in the foreign state, since he is not in possession of the road in New York, as such receiver, but by virtue of his contract, and he can not, therefore, escape the ordinary liabilities of persons operating railroads. And the action being

[1] Cardot *v.* Barney, 63 N. Y., 281. In Camp *v.* Barney, 6 N. Y. S. C. (Thomp. & Cook), 622; 4 Hun, 373, it was held by the supreme court of New York, that, while an action for personal injuries sustained by a passenger would not lie against the receiver personally, he would be liable in such action as receiver, and the judgment should be made payable out of the funds in his hands as receiver.

[2] Metz *v.* B., C. & P. R. Co., 58 N. Y., 61.

in tort, it may be brought against one of several receivers who occupy the same relation to the property and to the subject-matter of the action.[1] And in a still later case, it is held that when, by the order appointing him, the receiver is authorized to take possession of all the property of the company and to exercise its functions and continue its operations, and to pay rentals under any leases held by the company, if he takes possession of and operates a road held under lease by the company, he thereby assumes the obligations of the lessee and binds the estate to the payment of the rent. An action may, therefore, be maintained against him to recover such rent out of the funds in his hands, and in such action he is estopped from denying the validity of the lease.[2]

§ 396. Since the receivers of a railway, who are vested with its absolute control and management, are thus liable for injuries resulting from negligence in operating the road, to the same extent that the company itself might have been held liable, it would seem to be clear, upon principle, and in the absence of any absolute liability created by statute, that the corporation itself can not be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company can not control either the receiver or his employees. And in an action against a railway company for damages for personal injuries alleged to have resulted from the carelessness and negligence of employees and servants, it is a sufficient defense that the road, at the time of the alleged injury, was not in defendant's possession, but in the possession of a receiver, who had exclusive charge of the employment and management of the agents and employees engaged in operating the road.[3] But where a railway company, in an action

[1] Kain *v.* Smith, 80 N. Y., 458. And see Fuller *v.* Jewett, 80 N. Y., 46.

[2] Woodruff *v.* Erie R. Co., 93 N. Y., 609.

[3] Ohio & Mississippi R. Co. *v.* Davis, 23 Ind., 553; Bell *v.* I., C. & L. R. Co., 53 Ind., 57; Turner *v.* Hannibal & St. Joseph R. Co., 74 Mo., 602; Ohio & Mississippi R. Co.

brought against it for damages, pleads the appointment of a receiver who has charge of its affairs, a copy of the order of appointment, or the original, should be set forth with the pleadings.[1]

§ 397. Where, however, an absolute liability is fixed upon a railway company by statute, a different principle prevails. Thus, if the company is made by statute absolutely liable for the killing of stock in cases where its road is not securely fenced, the fact that the affairs of the company have passed into the hands of a receiver, appointed by the federal court, constitutes no defense to an action on such liability against the railway company in the state court, and the plaintiff may recover judgment in such action upon the statutory liability, notwithstanding the possession of the receiver. In such cases, it is held that the corporate body still exists, and since the law renders it liable, the receiver operates the road subject to such liability.[2] But the state

v. Anderson, 10 Bradw., 313; Hicks *v.* I. & G. N. R. Co., 62 Tex., 38. See, also, Metz *v.* B., C. & P. R. Co., 58 N. Y., 61; I. & G. N. R. Co. *v.* Ormond, 62 Tex., 274. But it has been held that in such an action against the company, the fact that the road is in the hands of a receiver can not be inquired into upon a motion to dismiss for want of jurisdiction, although it may be urged in defense of the action. Wyatt *v.* O. & M. R. Co., 10 Bradw., 289.

[1] Ohio & Mississippi R. Co. *v.* Fitch, 20 Ind., 498.

[2] Ohio & Mississippi R. Co. *v.* Fitch, 20 Ind., 498; McKinney *v.* Ohio & Mississippi R. Co., 22 Ind., 99; Louisville, New Albany & Chicago R. Co. *v.* Cauble, 46 Ind., 277; Kansas Pacific R. Co. *v.* Wood, 24 Kan., 619. The doctrine of the text is very clearly stated in Louisville, New Albany & Chicago R. Co. *v.* Cauble, 46 Ind., 277, by Buskirk, J., who says, p. 279: "By the first section of the act of March 4, 1863, 3 Ind. Stat., 413, it is provided 'that lessees, assignees, receivers and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars or other carriages of such company, to the extent and according to the provisions of this act.' By the above quoted section, lessees, assignees, receivers or other persons running or controlling any railroad company in the corporate name of such company are made liable either jointly with the railroad company, or severally, that is, without the company being joined with them, for stock killed or injured by the locomotives, cars or other carriages of such company, to the extent and according to the provisions of such act. By the second section

court is powerless to enforce payment of the judgment recovered out of funds in the hands of a receiver appointed by the United States court, even under a statute of the state providing a process for the enforcement of judgments against railway corporations out of the funds in the hands of their receivers or agents. The receiver deriving his appointment and authority from the federal court, and being charged with the duty of operating the road and accountable to that court for the proceeds, these proceeds are beyond the jurisdiction or control of the state court. The proper course for the plaintiff, in such a case, would seem to be either to apply to the federal court for leave to sue the

of such act, it is provided in express terms that such action may be brought against the railroad, whether the same was being run by the company or by a lessee, assignee, receiver or other person in the name of the company. The question discussed by counsel for appellant therefore resolves itself into the question of whether the legislature of this state possessed the constitutional power to pass the above recited act. The corporate existence, powers and franchises of the appellant were conferred by the legislature of this state. We have carefully examined the decree of the United States circuit court for the district of Indiana, appointing Mr. Chapman receiver, and find nothing therein which attempts to take away the corporate existence, powers or franchises of the appellant, and it is therefore unnecessary for us to express any opinion as to the power of the federal judiciary to decree a forfeiture of the corporate existence and franchises of a corporation created by a sovereign state. The whole decree proceeds upon the theory that the appellant is a corporation created and existing under the laws of this state. The whole effect of the decree is, to take the custody, control and management of such corporation out of the hands of the persons who were controlling and managing the same, and to place the same into the custody and under the control and management of the receiver for a specified time and for a special purpose. The corporate existence of the appellant was left intact. The corporate powers and franchises which had been exercised by the officers of the company were conferred for the time being upon the receiver. The power and authority of the receiver to manage and control the company and its operations depended upon its corporate existence. If that had been taken away, the power and authority of the receiver would have ceased and terminated, for no court, federal or state, can confer corporate powers and franchises upon an individual. Such powers can be created and conferred by the legislative department alone."

receiver, or for an order on the receiver to pay the judgment recovered in the state court.[1] And in an action against a railway company to recover damages for personal injuries, defendant can not plead, either in bar or in abatement of the action, that at the time of beginning the suit the company was in the hands of a receiver, since the appointment of the receiver does not impair the jurisdiction of the court over the defendant company, or over the subject-matter of the action.[2]

§ 398. It has already been shown, that receivers of railways are liable to actions for personal injuries incurred during their management and operation of the road, leave of court being had to bring the action.[3] It is not to be understood that their liability is confined to this class of actions, and it may be affirmed, generally, that they are liable as common carriers for negligence in the performance of their duties, and an action for damages sustained by such negligence will lie against them in their official capacity. The fact that they were acting as receivers, under appointment from a court of chancery, can not be recognized as a defense to a suit at law for breach of any obligation or duty voluntarily assumed by them in conducting their business as such receivers. And their assumption of the duties and responsibilities of common carriers is not regarded as incompatible with any duty or responsibility imposed upon them as receivers.[4] Being thus held liable as common carriers in the state of their appointment, such receivers may be held to the same liability in another state. And in an action brought against them in another state to recover damages for loss of freight, the court will not concede to the defendants an exemption from the ordinary liabilities of common carriers more extensive than is allowed them in the state of their appointment, and in which the loss oc-

[1] Ohio & Mississippi R. Co. *v.* Fitch, 20 Ind., 498.

[2] O. & M. R. Co. *v.* Nickless, 71 Ind., 271.

[3] See § 395, *ante.*

[4] Blumenthal *v.* Brainerd, 38 Vt., 402; *Ex parte* Brown, 15 S. C., 518.

curred. And in such a case, the ordinary rule, that receivers are amenable solely to the court appointing them, has been held to be inapplicable.[1] But while the cases supporting this doctrine are believed to state the correct rule as to the liability of railway receivers as common carriers, they are not to be accepted as authoritative upon the right to institute such actions without leave of the court appointing the receiver, since, as we have already seen, the better considered doctrine, and that supported by the clear weight of authority, requires such permission before the action may be brought.[2]

§ 398 *a*. An action may be maintained against the receiver, by leave of court, to recover damages sustained by plaintiff by the construction of the railway through his premises without making compensation therefor, prior to the receiver's appointment, the judgment, when recovered, to be satisfied out of the assets in the receiver's hands under the orders of the court appointing him.[3] But a contract by which a railway company gives to an express company the exclusive right to transact all express business over the road for a given period, can not be enforced against a receiver afterward appointed in foreclosure proceedings against the railroad. Such a contract gives no lien upon the property of the company, and its specific performance by the receiver would be only a form of payment or satisfaction which he can not be required to make.[4]

[1] Paige *v.* Smith, 99 Mass., 395.

[2] See § 395 *a*, *ante*. In Davies *v.* Lathrop, 20 Blatchf., 397, it is held that when a citizen of New Jersey is appointed receiver over a railway corporation of that state, and afterward, by an ancillary proceeding in New York, he is appointed receiver over the property of the company in that state, and an action is brought by citizens of New York, in a court of that state, against the receiver, to recover for the death of plaintiff's intestate upon a train operated by the receiver in New Jersey, the receiver will be regarded as a citizen of New Jersey, and the cause may, therefore, be removed to the United States court in New York.

[3] Combs *v.* Smith, 78 Mo., 32.

[4] Express Co. *v.* Railroad Co., 99 U. S., 191.

§ 398 *b*. After the discharge of the receiver, no action can be maintained against him to recover for personal injuries sustained by the negligence of his employees, since he can not be made personally liable for their torts.[1] If, however, the purchaser at the foreclosure sale acquires the property subject to all demands against the receiver, the court still retaining jurisdiction of the cause for the purpose of enforcing payment of such demands, it may entertain a petition against the purchaser to recover for personal injuries sustained during the receiver's operation of the road.[2] And in such case, a judgment for such cause of action being by the laws of the state made a lien upon the railway, the judgment may be established as a lien after the road has passed into the hands of purchasers.[3] But when the road is sold, subject to the payment of all liabilities incurred by the receiver in its operation, a bill in equity can not be maintained against the purchasers to recover damages for injuries sustained during the receivership, since equity will not assume jurisdiction of a controversy for the recovery of unliquidated damages in tort.[4] Such a purchaser, however, having purchased subject to all liabilities growing out of the receiver's operation of the road, is liable in an action at law for the recovery of such damages, the injury having been caused by the negligence of the receiver's employees.[5] And when the foreclosure sale is had expressly subject to all indebtedness incurred by the receiver, which is declared to be a lien upon the property prior to that of the mortgages, the purchasers covenanting to pay all damages and liabilities incurred by the receiver, or which should have been paid out of the property, the purchasers are liable for the payment of a judgment recovered against the receiver on account of

[1] Davis *v.* Duncan, 19 Fed. Rep., 477; Farmers Loan & Trust Co. *v.* Central Railroad, 7 Fed. Rep., 537.

[2] Farmers Loan & Trust Co. *v.* Central Railroad, 17 Fed. Rep., 758.

[3] Farmers Loan & Trust Co. *v.* Central Railroad, 17 Fed. Rep., 758; S. C., 5 McCrary, 421.

[4] Brown *v.* Wabash R. Co., 96 Ill., 297.

[5] Sloan *v.* Central Iowa R. Co., 62 Iowa, 728.

the death of plaintiff's intestate while the road was operated by the receiver. In such case, the judgment creditor may maintain an action against the purchasers for the recovery of the judgment, or to establish a lien upon the property and for its sale in satisfaction of the judgment.[1] So when property is purchased and paid for out of the receiver's income, and is delivered to the company upon the surrender back of the road at the termination of the receivership, such property is liable in equity for damages sustained by injuries while the road was operated by the receiver, when the rights of third persons have not intervened, the liability, in such case, being based upon the diversion of income by the receiver.[2]

[1] Schmid *v.* N. Y., L. E. & W. R. Co., 32 Hun, 335. And see Ryan *v.* Hays, 62 Tex., 42; Hicks *v.* I. & G. N. R. Co., 62 Tex., 38; I. & G. N. R. Co. *v.* Ormond, 62 Tex., 274.

[2] Mobile & Ohio R. Co. *v.* Davis, 62 Miss., 271.

VI. Receivers' Certificates.

§ 398 *c*. In actions for the foreclosure of railway mortgages, a practice has grown up in recent years of authorizing the receiver appointed in the foreclosure proceedings to issue debentures or certificates of indebtedness for the purpose of raising money to procure materials, labor, supplies and rolling stock, for the maintenance and repair of the road, and in some instances for completing an unfinished line or for making extensions of an existing line of road. These certificates are, by the order of the court, declared to be a first lien upon the entire property, income and franchises of the railway company, and such order is usually recited in the body of the certificate itself. In cases where resort is had to this method of raising money, the income of the receivership being generally inadequate to the payment of the certificates, they are usually paid out of the proceeds of foreclosure, before a distribution to the mortgage bondholders. The power to thus create a new lien or mortgage upon the property, and to give it priority over existing mortgages, marks the extreme limit which courts of equity have thus far attained in the exercise of their extraordinary jurisdiction. It can hardly be questioned that the exercise of such a power impairs the obligation of the mortgage contract, and frequently results in the diversion of a large portion of the mortgage security. A power so dangerous because so limitless can not be sustained upon any just principles of legal reasoning. Nevertheless, as was said upon the question of preferring payment of operating expenses prior to the receiv-

ership, as against the lien of mortgage bondholders, this branch of the jurisdiction is so well established upon authority that its existence is no longer open to question.[1] The exercise of the jurisdiction is justified upon the principle that the court having taken under its charge the property of the railway company as a trust fund for the payment of incumbrances, it may authorize its receivers to raise money necessary for the preservation and management of the property, and may charge the same as a lien thereon, when necessary for the preservation of the trust estate.[2] The exercise of the power is also justified from the peculiar nature of railway property and from the necessity of continuing it in operation as a "going concern," pending foreclosure proceedings, as well as for the preservation and protection of the interests of the public.[3] The jurisdiction is to be exercised with extreme caution, and, if possible, with the consent or acquiescence of the parties in interest. And when the certificates have thus been issued, either with the consent of the bondholders, or without objection on their part, they will be enforced as a prior lien upon the property, and will be paid out of the proceeds of foreclosure, before payment to the bondholders.[4]

[1] Wallace *v.* Loomis, 97 U. S., 146; Meyer *v.* Johnston, 53 Ala., 237; Hoover *v.* M. & G. L. R. Co., 29 N. J. Eq., 4; Taylor *v.* P. & R. R. Co., 7 Fed. Rep., 377; Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 513; Kennedy *v.* St. Paul & Pacific R. Co., 2 Dill., 448; S. C., 5 Dill., 519.

[2] Wallace *v.* Loomis, 97 U. S., 146.

[3] Meyer *v.* Johnston, 53 Ala., 237.

[4] Wallace *v.* Loomis, 97 U. S., 146. Mr. Justice Bradley, delivering the opinion of the court, says, p. 162: "The receivers were authorized by the order appointing them, amongst other things, to put the road in repair and operate the same, and to procure such rolling stock as might be necessary; and, for these purposes, to raise money by loan to an amount named in the order, and issue their certificates of indebtedness therefor; and the order declared that such loan should be a first lien upon the property, payable before the first mortgage bonds. The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable

§ 398 *d*. No limit has been fixed as to the purposes for which receivers' certificates may be issued, other than that they shall be germane to the objects of the receivership and necessary to the proper administration of the trust. Thus, they have been authorized for the preservation, management and repair of the road, and for the purchase of rolling stock;[1] for the making of repairs only;[2] for the further construction, equipment and final completion of the road;[3] to complete an unfinished portion of the road within the time fixed by law, and thus to prevent the lapsing of valuable land grants and franchises of the company;[4] for the improvement, repair and operation of the road;[5] to procure rolling stock, machinery and necessary supplies, and to repair and operate the road,[6] and in payment for labor, materials, supplies and taxes due prior to the receivership.[7] The issue of the certificates is, however, confined strictly to the purposes expressed in the order, and these purposes can not be extended by implication. And when the receiver is authorized to issue certificates as material is furnished and labor performed in extending the road, not to exceed a given amount per mile, he can not issue them in advance of the actual performance of the labor or furnishing of the materials.[8] Nor will they be issued without notice to all

as a lien thereon for its repayment, can not, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund. In this case it appears that the parties most materially interested either expressly consented to the order, or offered no objection to it."

[1] Wallace *v.* Loomis, 97 U. S., 146.

[2] Hoover *v.* M. & G. L. R. Co., 29 N. J. Eq., 4.

[3] Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 518; Bank of Montreal *v.* Thayer, 7 Fed. Rep., 622.

[4] Kennedy *v.* St. Paul & Pacific R. Co., 2 Dill., 448; S. C., 5 Dill., 519.

[5] Turner *v.* P. & S. R. Co., 95 Ill., 134; Stanton *v.* A. & C. R. Co., 2 Woods, 506.

[6] Swann *v.* Clark, 110 U. S., 602.

[7] Humphreys *v.* Allen, 101 Ill., 490; Taylor *v.* P. & R. R. Co., 7 Fed. Rep., 377.

[8] Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 518.

parties in interest, or without a full hearing as to the necessity for the proposed expenditure,[1] or at a higher rate of interest than that allowed by law.[2] But notice to the trustee of mortgage bondholders, of the application for leave to issue the certificates, will be treated as notice to the bondholders, the trustee being regarded for such purposes as the representative of the bondholders.[3]

§ 398 *e*. Receivers' certificates, being merely an evidence of indebtedness issued for a special purpose, under a judicial order, and payable out of a special fund, are not negotiable instruments or commercial paper in the sense that innocent purchasers for value will be protected as against the equities existing between the original parties. And while they may be transferred by assignment, or even by delivery if payable to bearer, the purchaser or assignee can only recover upon them to the extent that the original payee could have recovered.[4] It follows, therefore, that the assignor or indorser of such certificates is not liable as a guarantor or indorser of commercial paper, nor does the assignment import a warranty that the certificates are collectible and will be paid.[5] And while persons who advance money upon the faith of the certificates are not bound to see to its application by the receiver, they can only enforce the certificates out of the proceeds of foreclosure to the extent of the money actually advanced to the receiver.[6] So it is held that the negotiation and sale of the certificates is a trust personal to the receiver, which he can not delegate to an agent. And when one has purchased the certificates from an agent or broker of the receiver at a large discount, the agent not accounting to the receiver for the proceeds,

[1] *Ex parte* Mitchell, 12 S. C., 83; Meyer *v.* Johnston, 53 Ala., 237.

[2] Meyer *v.* Johnston, 53 Ala., 237.

[3] Wallace *v.* Loomis, 97 U. S., 146.

[4] Turner *v.* P. & S. R. Co., 95 Ill., 134; Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 518; Stanton *v.* A. & C. R. Co., 2 Woods, 506; Union Trust Co. *v.* C. & L. H. R. Co., 7 Fed. Rep., 513; McCurdy *v.* Bowes, 88 Ind., 583.

[5] McCurdy *v.* Bowes, 88 Ind., 583.

[6] Stanton *v.* A. & C. R. Co., 2 Woods, 506.

the purchaser can not enforce the certificates.[1] So the certificates referring upon their face to the order under which they are issued, a purchaser is chargeable with notice of the terms of such order, and is bound to know at his peril whether they are issued in accordance with its terms and conditions.[2] And certificates issued in excess of the amount authorized by the court are void, even in the hands of innocent holders, and will not be awarded priority of payment out of the funds of the receivership. But when money is advanced in good faith upon such an overissue of certificates, and is used by the receiver in payment of overdue coupons for interest upon the mortgage indebtedness, the persons advancing such money may be subrogated to the rights of the coupon holders, and may receive the proportion due to such coupons out of the proceeds of the foreclosure sale, upon final distribution.[3] If, however, a receiver executes and places upon the market certificates containing false and fraudulent representations intended to deceive purchasers, the receiver is personally liable in an action for damages brought by one who purchases the certificates in good faith and relying upon such representations.[4]

§ 398*f*. Although, as has already been shown, receivers' certificates are not negotiable instruments, yet when a receiver in foreclosure proceedings is authorized to issue them in payment for operating expenses, rentals, taxes and improvements incurred before his appointment, a bondholder desiring to question their validity and priority of lien should do so before they are issued and sold. And if, with full knowledge of all the facts, he permits them to be sold without objection, he and those claiming under him with full notice of such facts, can not afterward be heard to question the payment of the certificates in full out of the proceeds

[1] Union Trust Co. *v.* C. & L. H. R. Co., 7 Fed. Rep., 513.

[2] Bank of Montreal *v.* C., C. & W. R. Co., 48 Iowa, 518.

[3] Newbold *v.* P. & S. R. Co., 5 Bradw., 367.

[4] Bank of Montreal *v.* Thayer, 7 Fed. Rep., 622.

of the foreclosure sale, prior to distribution among the bondholders.[1]

§ 398 *g*. When receivers' certificates are issued in foreclosure proceedings as a first lien upon all the property of the railway company, to be paid before the mortgage bondholders out of the proceeds of the sale, and the property is sold expressly subject to such liens and to all liabilities incurred by the receiver, a decree in a subsequent suit brought by the holders of the certificates, declaring them to be a first lien upon the property to the extent of the money actually advanced to the receiver thereon, will be upheld as against the purchaser at the foreclosure sale.[2] In such case, the purchaser having acquired his title subject to all such liens and priorities as may be allowed by the court prior to the mortgage indebtedness, can not, after such liens have been established in the foreclosure proceedings, maintain a new action to dispute their validity, the parties in interest in the former suit having been fully heard in the proceeding to establish the validity and priority of such prior liens.[3] If, however, the railway is sold to satisfy the certificates, such sale will not divest a mechanic's lien claimed by a creditor for the construction of the road, who has instituted proceedings to enforce his lien before the appointment of the receiver, and who was not made a party to the suit in which he was appointed and in which the property was sold. In such case, the receiver in no manner represents the creditor claiming such lien, and the property is therefore regarded as having been sold subject to his lien.[4]

[1] Humphreys *v.* Allen, 101 Ill., 490. See, also, Langdon *v.* Vermont & Canada R. Co., 53 Vt., 228.

[2] Swann *v.* Clark, 110 U. S., 602.

[3] Swann *v.* Wright's Ex'r, 110 U. S., 590.

[4] Snow *v.* Winslow, 54 Iowa, 200.

CHAPTER XII.

OF RECEIVERS IN AID OF JUDGMENT CREDITORS.

I. Principles on Which the Relief is Granted.

§ 399. No branch of the law of receivers is more frequently invoked in this country than that which governs the jurisdiction as exercised in behalf of judgment creditors, for the enforcement of their judgments in cases where the usual legal remedies have been exhausted, and when the aid of equity is, therefore, necessary for the protection of the creditor. The jurisdiction of equity by the appointment of receivers, in this class of cases, while deriving its origin from the English Court of Chancery, has been more largely shaped and developed by the decisions of American courts, than has any other branch of the law under consideration. The fundamental principle upon which it rests is the inadequacy of the legal remedy, and the consequent necessity for the aid of equity to supplement the remedy at law. This principle may be traced back through all the adjudications upon the subject, and it was said by Lord Eldon, to have been long settled, that when a judgment creditor took out execution, and found the estate of his debtor protected by circumstances respecting a prior title, he might apply for a receiver, and that the fact that the creditor could not execute his judgment at law would entitle him to a receiver of the debtor's estate.[1] The same principle, it is believed, will be found to underlie most of the decisions in this country upon this topic, and it may be regarded as the foundation of the entire jurisdiction of equity in appointing receivers in creditors' suits.[2]

[1] See Curling *v.* Marquis Townshend, 19 Ves., 628.

[2] As to the power of a court of equity to appoint a receiver to collect taxes due to a municipal corporation and to apply them in payment of the indebtedness of such corporation, at the suit of its cred-

§ 400. The American law upon this subject has been very largely shaped by the decisions of the New York courts, both under the former chancery practice in that state, and under the code of procedure by which the former system was succeeded. Under the practice of the New York Court of Chancery, the appointment of receivers on creditors' bills, after return of execution unsatisfied, was almost a matter of course, for the preservation of the debtor's property pending the litigation.[1] And it was held that when the sworn bill, filed by the judgment creditor, showed that he had an equitable right to all the funds and property of the defendant to satisfy his debt, if this right was not denied by defendant in answer to the application for a receiver, no reason existed why the appointment should not be made.[2] And it was not a sufficient answer to the application to say that there was no property to protect belonging to defendant, since, in such case, he could suffer no injury, and plaintiff proceeded at the peril of his costs.[3]

itors, its charter having been revoked by the legislature, see Meriwether *v.* Garrett, 102 U. S., 472; Garrett *v.* City of Memphis, 5 Fed. Rep., 860.

[1] See Bloodgood *v.* Clark, 4 Paige, 574; Osborn *v.* Heyer, 2 Paige, 342; Fitzburgh *v.* Everingham, 6 Paige, 29; Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214. And see Johnson *v.* Tucker, 2 Tenn. Ch., 398. Indeed, the practice seems to have been more liberal than was at all times consistent with the established principles of equity; so much so, at least, as to provoke the criticism of Vice-Chancellor Sandford, in Iddings *v.* Bruen, 4 Sandf. Ch., 424. "Most of our notions of a receiver at this day," says the learned judge, "are derived from the course and practice in judgment creditors' suits, where they are principally used, and in which many things have occurred to render them the mere puppets of the complainant in the particular suit. One cause of this has been the difficulty of procuring persons to accept the appointment, and give the security requisite, where the prospect of assets and of corresponding compensation was often doubtful, if not desperate. And another cause was the practice of limiting the assets to be handed over, to the amount of complainant's debt, and probable costs, where he had the good fortune to discover more than his own debt required."

[2] Bloodgood *v.* Clark, 4 Paige, 574.

[3] Bloodgood *v.* Clark, 4 Paige, 574; Browning *v.* Bettis, 8 Paige, 568. The practice which obtained under the New York Court of

The court proceeded upon the theory that, after the defendant debtor was enjoined from interfering with or disposing of his property himself, he could have no honest motive in resisting the appointment of a receiver, since, if he had property, it was for his own interest that it should be preserved pending the litigation, and if he had none, there was nothing for the receiver to do, and plaintiff was liable for costs.[1] And it was held to be the duty of the judgment creditor, after filing his bill to reach the equitable assets of his debtor, and obtaining an injunction to restrain the debtor from interfering therewith, to apply to the court within a reasonable time for a receiver of the debtor's assets, in order to prevent their being wasted, and to secure the collection of the debts.[2] And in such case, when the bill made out a *prima facie* case for a receiver, it was regarded

Chancery was stated by Chancellor Walworth, in Bloodgood *v.* Clark, as follows, p. 577: "In these cases of creditors' bills, where the return of the execution unsatisfied presupposes that the property of the defendant, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance, it seems to be almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation. And where the sworn bill of the complainant shows that he has an equitable right to all the funds and property of the defendant to satisfy his debt, if the right of the complainant is not denied by the defendant, in answer to the application for a receiver, there can be no good reason why the complainant should not have a receiver appointed to preserve the property from waste or loss. Indeed, this court has already declared that it is the duty of a complainant who has obtained an injunction upon such a bill, restraining the defendant from collecting his debts or disposing of property which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without any unreasonable delay. (See Osborn *v.* Heyer, 2 Paige, 343.) It is no sufficient answer to such an application to say there may not be any property to protect, as the complainant proceeds at the peril of costs, if there is no property. And if there is nothing for the receiver to take, the defendant can not be injured by the appointment." See, also, Fuller *v.* Taylor, 2 Halst. Ch., 301. But see, *contra*, Dollard *v.* Taylor, 33 N. Y. Supr. Ct. R., 496.

[1] Fitzburgh *v.* Everingham, 6 Paige, 29.

[2] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214; Osborn *v.* Heyer, 2 Paige, 342. See, also, Bloodgood *v.* Clark, 4 Paige, 574.

as no objection to the appointment that the defendant had not yet answered.[1]

§ 401. Under the New York code of procedure, as well as in many of the states which have adopted the code practice from New York, provision is made for the appointment of receivers on proceedings by judgment creditors "supplementary to execution," which proceedings have taken the place of the former creditors' bill. Indeed, the appointment of a receiver on supplementary proceedings under the code of procedure, is regarded merely as a substitute for the proceedings had for the same purpose under the former chancery practice.[2] And an examination of the New York decisions, in this class of cases, will show that the courts of that state are still governed by the principles established under the former practice, in administering this species of relief in behalf of judgment creditors. Under the present system, the appointment of a receiver of the effects of a judgment debtor, on supplementary proceedings, has become almost a matter of course; as much so, indeed, as it formerly was on creditors' bills under the chancery practice.[3] The object of the proceeding under the code is to compel the application of property concealed by the debtor, or which from its nature can not be levied upon under execution, to the payment of the creditor's judgment. And the remedy is regarded as a cumulative one, and would seem, therefore, to extend to property which might be the subject of levy and sale under execution.[4] So in Minnesota, upon proceed-

[1] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214.

[2] Spencer *v.* Cuyler, 9 Ab. Pr., 382; People *v.* Mead, 29 How. Pr., 360. And see this case, generally, for a statement of the practice and procedure in appointing receivers in this class of proceedings under the code. And see Coates *v.* Wilkes, 92 N. C., 376, for a full discussion of the functions of such receivers, of the principles governing the courts in appointing them, and of the practice and procedure, under the code of procedure of North Carolina.

[3] Heroy *v.* Gibson, 10 Bosw., 591. See, also, Coates *v.* Wilkes, 92 N. C., 376; Flint *v.* Webb, 25 Minn., 263.

[4] Heroy *v.* Gibson, 10 Bosw., 591. As to the right to a receiver, under the New York code, in an action by a judgment creditor to recover

ings supplementary to execution, a receiver may, in the discretion of the court, be appointed immediately upon the granting of an order for the examination of the judgment debtor, this being regarded as the better practice, since the judgment creditor thereby acquires that priority of lien upon his debtor's property to which his vigilance entitles him.[1] And under proceedings supplementary to execution in Minnesota, a receiver may be appointed over the estate of a judgment debtor, with power to collect a debt due to him from a municipal corporation.[2]

§ 402. The first general principle to be observed as governing this branch of the extraordinary jurisdiction of equity is, that a judgment creditor, seeking the aid of the court by the appointment of a receiver, must have used due diligence in the assertion of his rights.[3] The bill must, therefore, be filed within a reasonable time after the return of execution unsatisfied. And while it is impossible to fix any precise period of limitation, within which the judgment creditor must assert his right to the aid of equity, it has been held that when he has suffered a period of nine years to elapse, after return of his execution *nulla bona*, without taking any steps for the enforcement of his demand, and then files a creditors' bill on which he moves for a receiver, his long delay is of itself sufficient ground for refusing the relief.[4] And when, after moving for a receiver of the debtor's property, the judgment creditor permitted the proceedings to lie dormant, and took no further steps to procure the appointment for a period of more than a year, and until another creditor had procured an order for a receiver, the court refused to allow the receiver appointed on the second

shares of stock alleged to be the property of the judgment debtor, but which stand upon the books of the corporation in the name of the wife, see State Bank *v.* Gill, 23 Hun, 410.

[1] Flint *v.* Webb, 25 Minn., 263.

[2] Knight *v.* Nash, 22 Minn., 452.

[3] Gould *v.* Tryon, Walk. (Mich.), 353. See, also, Fogarty *v.* Bourke, 2 Dr. & War., 580; National Mechanics Banking Association *v.* Mariposa Co., 60 Barb., 423.

[4] Gould *v.* Tryon, Walk. (Mich.), 353.

application to be displaced, but removed the other one. Such a case, it was held, should be governed by the principles applicable to dormant executions, and the vigilant creditor should be allowed priority.[1] And when the creditor had acquiesced in the debtor's possession of his property and estate for a long period of years, and had recognized the debtor's title by accepting from him a lease of a portion of the property, it was held sufficient ground for refusing a receiver, when the answer positively alleged that the indebtedness had been paid in full.[2]

§ 403. Another leading principle, and one of equal importance with that just stated, by which courts of equity are governed in the appointment of receivers in behalf of judgment creditors, is, that the plaintiff must have fully and completely exhausted his remedy at law for the collection of his judgment, before he is entitled to the aid of a receiver in equity.[3] And when the bill itself shows that defendant is in possession of property which is subject to levy and sale under execution, and that there is no obstacle or impediment in the way of enforcing the judgment by the usual process at law, no ground is presented for the appointment of a receiver.[4] And when it is apparent that the defendant debtor has such an interest in real estate as may be reached by execution, his title being clear and there being no obstacles in the way of enforcing the judgment by execution, an additional reason for refusing a receiver, and for leaving plaintiff to sell the property under execution, is found in the fact that by this course the defendant will not be deprived of the redemption allowed by law. For, while it would be possible to reserve the right of redemption on

[1] National Mechanics Banking Association *v.* Mariposa Co., 60 Barb., 423.

[2] Fogarty *v.* Bourke, 2 Dr. & War., 580.

[3] Smith *v.* Thompson, Walk. (Mich.), 1; Thayer *v.* Swift, Harring. (Mich.), 430; Steward *v.* Stevens, id., 169; Parker *v.* Moore, 3 Edw. Ch., 234; Congden *v.* Lee, 3 Edw. Ch., 304; Starr *v.* Rathbone, 1 Barb., 70; Cassidy *v.* Meacham, 3 Paige, 311.

[4] Parker *v.* Moore, 3 Edw. Ch., 234; Starr *v.* Rathbone, 1 Barb., 70; Second Ward Bank *v.* Upmann, 12 Wis., 499.

a sale by the receiver, it is regarded as the safer course to follow the method prescribed by law for sales under execution.[1] So when both the judgment creditor and the sheriff to whom his execution was delivered were apprised of defendant's ownership of particular real estate, which had been offered in satisfaction of the debt before judgment obtained, and there was no impediment to its sale under execution, the court was of opinion that the legal remedy had not been sufficiently exhausted to give the judgment creditor a standing in a court of equity, or the right to a receiver of the rents and profits of such real estate.[2] And when the

[1] Second Ward Bank *v.* Upmann, 12 Wis., 499.

[2] Congdon *v.* Lee, 3 Edw. Ch., 304. This was a motion on the part of plaintiffs in a creditors' bill, that the tenants of certain real estate on which their judgment was a lien be required to attorn and pay their rents to the receiver, before appointed in the cause. McCoun, Vice-Chancellor, says, p. 308: "The facts, as they now appear by the answer and by the affidavits read in opposition to the motion of the complainants, show that there was no necessity for the complainants coming into this court for a discovery of the defendant's real estate now sought to be reached. The complainants were informed beforehand of this particular property, and knew all about it. It was offered to them in satisfaction of their debt, before the judgment was obtained. When the sheriff called with the execution and inquired for property, he was referred, by the defendant, to the records of deeds for a description of the property which he could levy on and sell; and there was no impediment to such a sale. This must be supposed to have been well known, both to the complainants and the sheriff, who nevertheless returned the execution unsatisfied, without taking any step toward a levy or sale. There is no direct proof of collusion in this case between the complainants and the sheriff, but there is enough to show that the legal remedy had not been fairly exhausted when the bill was filed. The sheriff made a false return, or, at least, a return which he could not vouch for the truth of, until he had exposed the property for sale; and the complainants knew it to be so, yet immediately filed their bill founded upon it. With respect to the property in question, they stood in no need of a discovery or of any aid of this court to effect a sale. What right, then, have the complainants to a standing in this court, with respect to this property? To give them a right to the rents through the medium of the receiver, they should be honestly and fairly in court, either for the purpose of discovery or relief, or both. True, the sheriff's return of an execution unsatisfied, *prima facie* gives the right

bill itself showed the possession of a large amount of property in the defendant, which could be taken on execution, and that no execution had been issued on the judgment for a period of three years, and that defendant was doing business as a merchant in his own name, it was held that there was no obstacle in the way of enforcing plaintiff's remedy at law, and he was refused the aid of a receiver.[1] So when it appeared by the bill that the defendant debtor was the proprietor of a hotel, having a large amount of furniture and other property in his hotel, a receiver was denied, the remedy at law by execution not having been exhausted.[2] And when defendant showed by his affidavit that the proceedings under the creditors' bill had been precipitated against him, without necessity and with no previous notice of the amount of the judgment, or how much he was required to pay, and that he would have paid the judgment forthwith, if notified thereof, the court refused to appoint a receiver.[3]

to file a bill of this sort; and in Stoors *v.* Kelsey, 2 Paige, 418, a receiver was appointed, though it appeared that the defendant owned a lot of ground and gave the sheriff notice of the fact, and requested him to advertise it, which he refused to do; but there it did not appear that the plaintiff had any knowledge or information of the fact of the defendant's ownership or interest in the land; and there was nothing from which to infer collusion between the plaintiff and sheriff in making the return. Here the case, in that respect, is different; and I think, under the circumstances and the law and practice of this court in respect to these creditors' bills, that the complainants are bound to pursue their legal remedy for a sale of the property; and, not being legitimately in court for the purpose of discovery, and it not appearing how far, if any, the property will be deficient toward satisfying the judgment upon a sheriff's sale, the court has not jurisdiction to lay hold of the rents in the meantime, and prevent the defendant from receiving them. The result is, that the complainants' motion must be denied, and the defendant's motion to dissolve the injunction be granted, so far as it restrains the defendant from interfering with the real estate or the rents and profits of it. With the injunction thus removed, the defendant can do no act to prejudice the lien of the judgment, or embarrass a sale under a new execution to be issued."

[1] Parker *v.* Moore, 3 Edw. Ch., 234.

[2] Starr *v.* Rathbone, 1 Barb., 70.

[3] Hart *v.* Tims, 3 Edw. Ch., 226.

§ 403 *a*. It is, however, to be borne in mind that the fact that the remedy at law has proved ineffectual in the particular case, does not confer jurisdiction upon a court of equity to appoint a receiver if the legal remedy is adequate and complete in itself, its inefficiency being wholly due to the action of the persons or officers whose duty it is to afford the desired relief. Thus, when plaintiff obtains judgment against a county upon its obligations issued in aid of a subscription to a railway company, and in obedience to a writ of *mandamus* a tax is levied by the county authorities to pay the judgment, but the person selected as collector of the tax refuses to qualify or to act as such collector, equity has no jurisdiction to appoint a receiver for the purpose of collecting the tax, even though it is shown that no person can be found who will undertake such collection. The power of collecting taxes being wholly foreign to courts of equity, its exercise will not be assumed by such courts merely because the appropriate legal remedy has failed to afford relief.[1]

§ 404. Intimately connected with the doctrine requiring the creditor to first exhaust his remedy at law, is the question whether the aid of a receiver can properly be extended to a judgment creditor, upon the sheriff's return of an execution *nulla bona* before the return day thereof. While this question has given rise to some conflict of authority, and has not been wholly free from doubt, the doctrine may now be regarded as established, both upon principle and authority, that the return of an execution unsatisfied, before its return day and in the life-time of the writ, does not lay the foundation for a receiver upon a bill in behalf of the judgment creditor. The rule is founded upon the fundamental

[1] Thompson *v.* Allen County, U. S. Supreme Court, October Term, 1885, 18 Chicago Legal News, 127. See Supervisors *v.* Rogers, 7 Wal., 175. As to the power of a court of equity to appoint a receiver to collect taxes due to a municipal corporation and to apply them in payment of its indebtedness, its charter having been revoked by the legislature, see Meriwether *v.* Garrett, 102 U. S., 472; Garrett *v.* City of Memphis, 5 Fed. Rep., 860.

principle, that equity never lends its aid for the enforcement of rights which may be remedied in the usual course of proceedings at law, and the courts will not permit a judgment debtor to be harassed with a suit in chancery, until the creditor has availed himself of all his rights at law for the collection of his judgment. The court can not know, until the return day of the execution has elapsed, that the debtor may not have had property with which to satisfy the judgment; and if it can dispense with a legal and sufficient return to the execution, it may dispense with the execution entirely, and thus assume a jurisdiction not given by law. It is, therefore, requisite that the execution should remain in the hands of the sheriff the full period of its lifetime.[1]

[1] Thayer *v.* Swift, Harring. (Mich.), 430; Spencer *v.* Cuyler, 9 Ab. Pr., 382. See, also, Cassidy *v.* Meacham, 3 Paige, 311; Smith *v.* Thompson, Walk. (Mich.), 1; Williams *v.* Hubbard, id., 28; Beach *v.* White, id., 495; Steward *v.* Stevens, Harring. (Mich.), 169; Beck *v.* Burdett, 1 Paige, 305; McElwain *v.* Willis, 9 Wend., 548. But see, *contra*, Williams *v.* Hogeboom. 8 Paige, 469; Tyler *v.* Willis, 33 Barb., 327; S. C., *sub nom.* Tyler *v.* Whitney, 12 Ab. Pr., 465; Bowen *v.* Parkhurst, 24 Ill., 257. The doctrine of the text is forcibly stated in Thayer *v.* Swift, Harring. (Mich.), 430, where the execution had been returned by the sheriff some days before its return day, as follows: "That there was no goods and chattels, lands and tenements to be found in his bailiwick to secure or pay the sum due the complainant, or any part thereof, to his knowledge, after diligent search." The motion for a receiver was denied. Farnsworth, Chancellor, observes as follows, p. 431: "The foundation of the jurisdiction of this court in this class of cases is, that the judgment creditor shall have fully exhausted his remedy at law. It has been repeatedly held that the court will not retain a bill as a judgment creditor's bill merely, filed before the return day of the execution. In the absence of any authority or *dicta* upon the subject, I should have as little doubt upon a case where the execution was actually returned before the return day, although the bill was not filed until after the return day had elapsed. Courts of chancery have held the judgment creditor in every adjudged case, before administering this harsh remedy of depriving the debtor absolutely of all control over every part and portion of his property, to bring himself strictly and rigidly within this rule. No case can be found where this remedy has been afforded without a strict compliance with all the forms. What is the reason of the rule? It is that a judgment debtor shall not be harassed with a suit in chancery

§ 405. Where an execution was issued against the joint property of two defendants, upon a judgment rendered

until the creditor has availed himself of all his common-law rights to collect his judgment. The only *dictum* to be found which has ever led to any doubt upon this subject, is to be found in the opinion of Chancellor Walworth, in the case of Cassidy *v.* Meacham, 3 Paige, 312. This idea is thrown out as a perhaps, and rather as a speculation than as a decision. He says, perhaps a return made before the return day may be good by relation. But if we once depart from the well-settled rule, that the creditor shall fairly and fully first exhaust his remedy at law, where shall we stop?" See, also, opinion of the same court in Steward *v.* Stevens, Harring. (Mich.), 169, where the same doctrine is announced with regard to creditors' bills, though it does not appear from the reported case whether any motion was made for a receiver. In Spencer *v.* Cuyler, 9 Ab. Pr., 382, which was under the New York code of procedure, the sheriff had returned the executions, at plaintiff's request, before maturity. The supreme court, at general term, say, Johnson, J., delivering the opinion: "A return thus procured is, for this purpose, to be regarded as the act of the party, and not the official act of the sheriff. The remedy by execution, in such case, has not been exhausted, as the statute obviously intended it should be before these supplementary proceedings could be instituted. If the practice adopted in the cases before us is to prevail, the issuing and return of an execution would become a mere empty form, and might as well be dispensed with altogether; and besides, it would naturally, if not inevitably, lead to the most intolerable favoritism and abuse. If we allow a sheriff to yield to the persuasion or dictation of a friendly or influential creditor, and fix at his own discretion or caprice different return days for different executions in his hands at the same time, we at once invest him with the dangerous powers of discriminating between creditors, and giving one a preference over another in respect to all the equitable assets of the debtors, capable of being reached by these proceedings. This consideration alone seems to us a sufficient objection to the practice, without adverting to the hardship and oppression to which a defendant may be so readily and so summarily subjected under it." But in Williams *v.* Hogeboom, 8 Paige, 469, it was held that the objection that the complainant had not exhausted his remedy at law, because the sheriff did not wait until after return day of the execution before making his return, was not well taken, although it was said, following the *dictum* of Chancellor Walworth in Cassidy *v.* Meacham, 3 Paige, 311, that the court would not permit a creditor's bill, founded upon such a return, to be filed until after the return day of the execution had passed. And in Tyler *v.* Willis, 33 Barb., 327; S. C., *sub nom.* Tyler *v.* Whitney, 12 Ab. Pr., 465, it was held that the return of the execution unsatisfied, before its return day, constituted

against one of the two, personal service having been had only upon the one, and the sheriff returned to the execution that the defendants had no goods or chattels, lands or tenements, out of which to satisfy the execution, without in express terms negativing the fact that either of the two had any separate property, such return was held sufficient foundation for a creditor's bill and a receiver of the joint property of the two defendants and of the separate property of the defendant who was served with process.[1] But the objection that the bill did not allege that the execution was directed to the sheriff of the county where the defendant resided when it was issued, although an objection of form, was held to be sufficient ground for refusing a receiver, but the application was denied without costs, and the plaintiff was given leave to amend and to renew the application after amendment.[2]

§ 406. Having already shown that the aid of a receiver is only extended in behalf of creditors who have fully exhausted their remedy at law, it follows necessarily that the jurisdiction will not be exercised in favor of mere general creditors, whose rights rest only in contract and are not yet reduced to judgment, and who have acquired no lien upon the property of the debtor. Courts of equity will not permit any interference with the right of the citizen to control his own property, at the suit of creditors who have acquired no lien thereon, and whatever embarrassment the creditor may experience, by reason of the slow procedure of the courts of law, must be remedied by legislative and not by judicial authority. And while there are a few instances where the courts have maintained a contrary doctrine, the great weight of authority supports the rule, that, in the absence

no objection to the appointment of a receiver, in the absence of any collusion or fraud on the part of plaintiff to prevent a levy on the debtor's property. And it is held in Illinois, that a creditor's bill will lie upon the return of an execution *nulla bona* before the return day. Bowen *v.* Parkhurst, 24 Ill., 257.

[1] Austin *v.* Figueira, 7 Paige, 56.

[2] Williams *v.* Hogeboom, 8 Paige, 469.

of statutory provisions to the contrary, a general contract creditor, before judgment, is not entitled either to an injunction or a receiver against his debtor, on whose property he has acquired no lien.[1] Any interference with the debtor's property, or with his right of disposing of it, before judgment, is beyond the judicial power, and courts of equity will not extend their extraordinary jurisdiction beyond the limits fixed by the authorities.[2] Nor is the rule affected or

[1] Uhl *v.* Dillon, 10 Md., 500; Nusbaum *v.* Stein, 12 Md., 315; Hubbard *v.* Hubbard, 14 Md., 356; Rich *v.* Levy, 16 Md., 74; Hulse *v.* Wright, Wright, 61; McGoldrick *v.* Slevin, 43 Ind., 522; Bayaud *v.* Fellows, 28 Barb., 451; May *v.* Greenhill, 80 Ind., 124; Adee *v.* Bigler, 81 N. Y., 349; Johnson *v.* Farnum, 56 Ga., 144; Dodge *v.* Pyrolusite Manganese Co., 69 Ga., 665. And see Blondheim *v.* Moore, 11 Md., 365; Wiggins *v.* Armstrong, 2 Johns. Ch., 144; Holdrege *v.* Gwynne, 3 C. E. Green, 26; Young *v.* Frier, 1 Stockt., 465; Phelps *v.* Foster, 18 Ill., 309; Bigelow *v.* Andress, 31 Ill., 322; Rhodes *v.* Cousins, 6 Rand., 188. But see, *contra*, Haggarty *v.* Pittman, 1 Paige, 298; Cohen *v.* Meyers, 42 Ga., 46; Thompsen *v.* Diffenderfer, 1 Md. Ch., 489; Rosenberg *v.* Moore, 11 Md., 376; Wachtel *v.* Wilde, 58 Ga., 50; Morrison *v.* Shuster, 1 Mackey, 190. See, also, Kehler *v.* Jack Manufacturing Co., 55 Ga., 639.

[2] Uhl *v.* Dillon, 10 Md., 500. This was a bill for an injunction and receiver filed by a creditor on an open account, alleging that the defendant was largely indebted for his stock in trade; that he was disposing of his stock, had sold his real estate, and was collecting debts due him, with intent to defraud his creditors, and that he intended to abscond to parts unknown for the purpose of hindering, delaying and defrauding his creditors. An injunction was granted and a receiver was appointed by the court below, but on appeal the decree was reversed and bill dismissed. The court, Bartol, J., say, p. 503: "The bill filed by the appellees in this cause states no sufficient case entitling them to the relief prayed. No authority has been shown to this court, nor can any be produced, entitled to consideration, which sanctions the exercise of the high and extraordinary power of a court of chancery to interpose, by writ of injunction, in a case like the one before us, restraining a debtor in the enjoyment and power of disposition of his property. The appellees (the complainants below) are merely general creditors of the appellant, who have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the debtor's property, and were not entitled to the writ of injunction nor to the appointment of a receiver. Whatever may be the supposed defects of the existing laws of the state, in leaving to the debtor the absolute power of disposing of his

varied by reason of fraud on the part of the debtor, and a receiver will not be granted in favor of a creditor before judgment, even though the bill alleges that the debtor has made fraudulent transfers and mortgages of his property.[1] Thus, where the bill alleged that the debtor was wasting his resources and sending his goods beyond the reach of his creditors; that he was utterly insolvent and had executed a mortgage of his effects, without consideration, and for the purpose of hindering and defrauding his creditors; and that plaintiff had brought suit upon his demand, but would not be able to obtain judgment and execution before defendant's assets would be wasted, the court refused an injunction and a receiver.[2] So it is held that the fact of the debtor having entered his appearance and consented to judgment in certain actions, brought by other creditors upon demands which were justly due, will not warrant the court in granting a receiver upon the application of a creditor without judgment, since it is a debtor's right to prefer any creditor whom he may choose.[3]

property, and leaving the creditor to the slow and very inadequate legal remedies now provided, if such defects exist, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well defined rules of law. The learned Chancellor Kent, in the decision of the case of Wiggins *v.* Armstrong, 2 Johns. Ch. Rep., 144, has stated, most clearly and forcibly, the principles which govern the case before us, and we adopt its reasoning as applicable here."

[1] Hulse *v.* Wright, Wright, 61: Rich *v.* Levy, 16 Md., 74; Nusbaum *v.* Stein, 12 Md., 315. But in the latter case, the court seem to base their decision somewhat upon the fact that it appeared from the bill that the debtor's assets were sufficient to discharge his liabilities. See, *contra*, Haggarty *v.* Pittman, 1 Paige, 298; Cohen *v.* Meyers, 42 Ga., 46: Rosenberg *v.* Moore, 11 Md., 376.

[2] Rich *v.* Levy, 16 Md., 74.

[3] McGoldrick *v.* Slevin, 43 Ind., 522. While the general doctrine of the text is believed to be sustained by the undoubted weight of authority, there are several cases in which a contrary doctrine has

§ 407. While, as is thus shown, the rule denying the aid of a receiver for the protection of contract or general creditors, before judgment, is well established, an apparent exception to the rule has been recognized under the code of procedure in New York, in cases of partnership creditors, the exception, however, being based upon equitable principles not inconsistent with the spirit of the general rule. Thus, in the case of an indebtedness due from a copartnership, where the insolvency of the firm and of its individual members is conceded, and the indebtedness is admitted to be justly due, the creditor may have an injunction and a receiver, as against the partners and third persons to whom

been announced. In Haggarty *v.* Pittman, 1 Paige, 298, an injunction and receiver were allowed in behalf of creditors without judgment, upon a bill alleging insolvency of the debtor, and that he had made an assignment of his property to one of his creditors, who was himself insolvent. So in Rosenberg *v.* Moore, 11 Md., 376, an injunction and receiver were allowed on the application of general creditors, before judgment, upon the ground of a fraudulent conveyance of a portion of his property by the debtor, in trust for his creditors, and upon the further ground that the property was in imminent danger, being in the custody of a person of notoriously bad character. But it does not appear from the case as reported, that any objection was urged on the ground that plaintiffs had no judgment or lien upon the debtor's property. In Thompson *v.* Diffenderfer, 1 Md. Ch., 489, the court inclined to hold that creditors without judgment were entitled to a receiver, upon a bill alleging fraudulent transfers of his property by the debtor, and that he was in insolvent circumstances, but the receiver was refused on the ground that the answers fully denied the equities of the bill. In Cohen *v.* Meyers, 42 Ga., 46, where the bill charged insolvency of the debtor, and that he had fraudulently transferred his goods to a third person, who was charged with complicity in the fraud, and that the debtor had bought the goods with intent to defraud the plaintiffs, a receiver was allowed before judgment. In this case, the court based the right of the creditors to the relief upon the ground that the goods for which the indebtedness sued on was incurred, never in equity belonged to the defendant, he having obtained them by fraudulent intent, and that a proper case was, therefore, presented for the action of a court of equity. Notwithstanding these cases, however, it is believed that the weight of authority and reasoning supports the rule as laid down in the text.

they have attempted to assign their property for the purpose of hindering and delaying their creditors, even though his demand is not yet reduced to judgment. In such case, the debt not being disputed, and there being no advantage to be derived from a preliminary judgment and execution, it is deemed proper to extend all the relief desired in one and the same action, without compelling the creditor to resort to the delay of obtaining judgment in a separate suit.[1] The doctrine, however, of the New York courts upon this point, would seem to be limited to cases where the indebtedness is not disputed, and where the plaintiff creditor is proceeding not merely in behalf of himself and to secure his individual demand, but for the benefit of all creditors of the firm.[2] And in the case of a limited or special partnership, where upon the insolvency of the firm the assets become a trust fund, which it is the duty of the general partners to assign to a trustee for the benefit of all the firm creditors, if the general partners fail to perform this duty, the court may interfere by appointing a receiver of the firm assets for the benefit of all the creditors, in an action instituted by a general creditor for himself and such others as may elect to take the benefit of the action. The relief, in such case, would seem to be founded upon the nature of the firm assets, as a trust fund upon the insolvency of the partners, the creditor instituting the proceedings being regarded as a *cestui que trust* of such fund, even though he has not yet obtained judgment.[3]

[1] Mott *v.* Dunn, 10 How. Pr., 225. See, also, Levy *v.* Ely, 15 How. Pr., 395; Jackson *v.* Sheldon, 9 Ab. Pr., 127; LaCliaise *v.* Lord, 10 How. Pr., 461. In Mott *v.* Dunn, considerable reliance is placed by the court upon the provision of the code of procedure, that "where, during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition."

[2] LaCliaise *v.* Lord, 10 How. Pr., 461; Levy *v.* Ely, 15 How. Pr., 395. See, also, Jackson *v.* Sheldon, 9 Ab. Pr., 127.

[3] Jackson *v.* Sheldon, 9 Ab. Pr., 127.

§ 408. It is also to be noted that creditors, even before judgment, may have such a special or equitable lien upon the debtor's property as to entitle them to the aid of equity and to the protection of a receiver. For example, where persons have advanced money for effecting repairs upon a vessel, and for furnishing supplies, and have received from the master of the vessel an assignment of all the freight money and earnings of the vessel upon her voyage, and all lien and interest which he as master had thereon on account of such advances or his liability therefor, such creditors are entitled to an injunction to prevent any interference with the collection of the freight money, and a receiver to collect it, upon showing that the owners of the vessel are insolvent, and that the relief is necessary to protect their lien acquired by assignment from the master.[1]

§ 409. In Wisconsin, it is held to be competent for a court of general equity jurisdiction to appoint a receiver over the property and effects of a married woman, doing business as a trader, in an equitable action by her creditors to charge her individual property with the payment of her liabilities, when there is danger of the assets being wasted or put beyond the reach of creditors. Such a proceeding, it is held, bears a close resemblance to a creditor's bill for the enforcement of a judgment, and there would seem to be no impropriety in granting an injunction and a receiver, upon the same grounds as in cases of creditors' bills.[2]

§ 410. It is also held that a creditor holding an annuity, which is a charge upon real estate, may have the aid of a receiver when his annuity is in arrears and he is without legal remedy for its enforcement, although he can not have the receiver continued when his arrears are paid off.[3] And where a debtor has conveyed a life estate in certain leasehold premises, in trust for the purpose of securing his creditors by payment annually out of the rents and profits until

[1] Sorley *v.* Brewer, 18 How. Pr., 276.

[2] Todd *v.* Lee, 15 Wis., 365.

[3] Sankey *v.* O'Maley, 2 Mol., 491. See, also, Beamish *v.* Austen, Ir. Rep., 9 Eq., 361.

the indebtedness shall be extinguished, when the property is to be reconveyed, the creditors have such an interest as to entitle them to a receiver, when the payments are long in arrear, even though they do not occupy the position of mortgagees and have no power to sell the property.[1]

§ 411. Fraudulent assignments of his property by a judgment debtor, for the purpose of hindering and defeating his creditors, are frequently made the foundation for proceedings in equity for the appointment of a receiver in behalf of judgment creditors.[2] And when it is shown upon a creditor's bill that the judgment debtor has made an assignment of all his property in fraud of his creditors, to an assignee who is known to be insolvent, such a breach of trust is presented as to warrant the court in appointing a receiver of the property assigned. Especially will the relief be granted, in such case, when the debtor himself continues in possession of the property and exercises acts of ownership, there being no actual change of possession.[3] But while it is regarded as a sufficient *prima facie* case for the appointment of a receiver, to show an assignment of his property by the debtor to hinder and delay his creditors, to an assignee who is irresponsible and insolvent, yet when defendant satisfactorily shows to the court by affidavit that the plaintiff is in error as to the pecuniary condition of the assignee, the court will not by a receiver take the property out of the hands of the assignee before the rights of the parties are finally determined.[4] And the appointment of a receiver in behalf of judgment creditors, over the property of their debtor, does not of itself preclude or determine the rights of an assignee of the debtor claiming his assets under an assignment from him, and the property can only be re-

[1] Taylor *v.* Emerson, 4 Dr. & War., 117.

[2] See Connah *v.* Sedgwick, 1 Barb., 210; Goodyear *v.* Betts, 7 How. Pr., 187; Shainwald *v.* Lewis, 7 Sawyer, 148.

[3] Connah *v.* Sedgwick, 1 Barb., 210.

[4] Goodyear *v.* Betts, 7 How. Pr., 187.

covered by an action brought by the receiver; since the court can not determine a disputed question of title in passing upon the application for a receiver, especially when the assignee is not a party to the proceeding.[1] But in an action brought by a judgment creditor to set aside a conveyance of land made by the debtor with intent to defraud his creditors, the grantees being made parties, and the conveyance being found to be fraudulent as against the judgment creditor, it is proper to appoint a receiver to sell and convey the property.[2] So when a decree in equity is obtained against defendant requiring him to pay to complainant certain funds obtained by fraud and collusion, upon the return of execution unsatisfied complainant is entitled to a receiver, upon a bill alleging that defendant has disposed and is about to dispose of his property with intent to evade the decree and to hinder and delay complainant in its enforcement. And in such case, it is not necessary to specifically describe the property which it is sought to reach by the creditor's bill.[3] So when a judgment debtor has disposed of a large amount of his stock in trade, without accounting for the proceeds, and leaving a large amount of indebtedness unpaid, a receiver has been appointed in a creditor's suit, although the debtor denied any fraudulent disposition of his property, a receiver being necessary to institute the proper suits to determine what disposition was made of the property.[4]

§ 412. Courts of equity will also extend the aid of a receiver for the protection of creditors under assignments made by the debtor in good faith and without fraud for the benefit of his creditors, when the assignee refuses to accept of the trust created by the assignment, or when he

[1] Journeay v. Brown, 2 Dutch., 111. And see this case for the practice in New Jersey in appointing receivers in behalf of judgment creditors.

[2] Shand v. Hanley, 71 N. Y., 319. And see this case as to the effect of a receiver's sale upon prior liens.

[3] Shainwald v. Lewis, 7 Sawyer, 148. And see this case for an exhaustive discussion of the jurisdiction of equity by creditors' bills to reach the assets of a judgment debtor, and of the right to a receiver in such cases.

[4] Strong v. Goldman, 8 Biss., 552.

does not act in good faith in carrying out its terms.[1] Thus, in the case of a general assignment by a debtor for the benefit of his creditors, upon the refusal of the trustee named in the deed of assignment to proceed with the execution of the trust, a receiver may be allowed upon a bill filed by creditors for whose benefit the assignment was made.[2] And where an assignment is made to trustees for the benefit of creditors, a judgment creditor of the assignor, who files his bill in behalf of himself and other creditors in interest, is entitled to a receiver to take charge of the effects assigned, upon showing gross mismanagement on the part of the trustees, and a failure on their part to comply with the requirements of the trust, and that there is imminent danger of the assets being wasted and diverted from the purposes for which they were assigned.[3] So where real estate is conveyed by a debtor, in trust to be sold for the payment of his debts, and the rents to be applied for the same purpose, and the trustee has been in possession a number of years without paying, a creditor may have a receiver appointed until answer, when the trustee resides beyond the jurisdiction of the court and has not appeared to the action.[4]

§ 413. In proceedings supplementary to execution, under the New York code of procedure, it is no sufficient objection to placing the property and effects of a judgment debtor in the hands of a receiver, that the property sought to be reached is claimed by adverse claimants, and is such

[1] Suydam *v.* Dequindre, Harring. (Mich.), 347. And see Malcolm *v.* Montgomery, 2 Mol., 500.

[2] Suydam *v.* Dequindre, Harring. (Mich.), 347. And where a share in the profits of a business had been assigned to a person in consideration of money advanced for the purpose of carrying on the business, and a subsequent assignment was made to a third party, of a share of the profits in the same business, and the prior assignee applied for a receiver of the debts due the business, Lord Eldon held that the case was such that if the Vice-Chancellor, before whom the application was pending, was about to appoint a receiver to collect the assets, he would not interfere. Candler *v.* Candler, Jac., 225.

[3] Jones *v.* Dougherty, 10 Ga., 273.

[4] Malcolm *v.* Montgomery, 2 Mol., 500.

as can be taken in execution, and is accessible for purposes of seizure and sale, if the court is satisfied that the title to the property may be tried with as little expense in an action by the receiver, as in a suit brought by the adverse claimants.[1]

§ 414. It has already been shown, that the denial by defendant in a creditor's bill that he has any property or effects of any kind, of which a receiver could take possession if appointed, is no bar to the exercise of the jurisdiction in behalf of the creditor in a proper case.[2] And in conformity with the same principle, it is held that the fact of the debtor having filed his answer, denying that he has any property or effects of any kind, presents no sufficient objection to a motion for an order of reference to a master to appoint a receiver, and requiring the debtor to transfer his effects to such receiver under oath.[3] So it would seem to be no objection to the appointment of a receiver of the effects of a judgment debtor, that he has no other property than an equity of redemption in real estate, which he has always been willing to have sold on execution.[4] But it has been held improper to appoint a receiver, on proceedings supplementary to execution, merely for the purpose of attacking an alleged fraudulent assignment made by the debtor, when the judgment creditor himself has a right of action to set aside such assignment.[5]

§ 415. Under the practice of the New York Court of Chancery, it was customary, upon applications for receivers in aid of creditors' bills, to refer the case to a master in chancery to make the appointment. And it was held that the order of reference should authorize the master to appoint a receiver of all the property, equitable interests, things in action and effects belonging to the debtor, or in

[1] Todd *v.* Crooke, 4 Sandf., 694.

[2] See Browning *v.* Bettis, 8 Paige, 568; Bloodgood *v.* Clark, 4 Paige, 574. But see Dollard *v.* Taylor, 33 N. Y. Supr. Ct. R., 496.

[3] Fuller *v.* Taylor, 2 Halst. Ch., 301.

[4] Bailey *v.* Lane, 15 Ab. Pr., 373, note.

[5] Dollard *v.* Taylor, 33 N. Y. Supr. Ct. R., 496.

which he had any beneficial interest when the suit was instituted, except such articles of personal property as were by law exempt from sale on execution, and should require the master to take from the receiver the requisite security for the faithful performance of his trust. It should also require the defendant to assign to the receiver, under the direction of the master, all his property and effects, and should give the plaintiff leave to examine the debtor, or any other person, on oath before the master for any of the purposes of the reference.[1] Under such an order of reference, however, the plaintiff was not authorized to examine the defendant, or any other person, as to matters not connected with the receivership, or with ascertaining the possession, nature, value or character of the property which was to be assigned to the receiver. Plaintiff could not, therefore, examine the debtor merely for the purpose of determining whether he had made a fraudulent assignment of his property previous to the commencement of the action, when such property was no longer in his possession.[2] The chief purpose of such an examination was to ascertain what property the debtor had under his control and in his possession, in order that it might be delivered to the receiver for the benefit of the creditor. The receiver was not authorized, by virtue of his appointment, to seize such property as he might upon his own judgment deem that of the debtor, but this was to be determined by the examination before the master, it being the receiver's duty simply to take such property as might be specified by the master, thus avoiding collisions between the receiver and adverse claimants.[3]

§ 416. While, as we have thus seen in the preceding sections, courts of equity are inclined to a liberal exercise of their

[1] Green *v.* Hicks, 1 Barb. Ch., 309. And see this case as to the practice under such orders of reference, and as to the extent and scope of the examination of the debtor permitted under the reference. See, also, as to the practice on such examinations, Dickerson *v.* Van Tine, 1 Sandf., 724.

[2] Green *v.* Hicks, 1 Barb. Ch., 309.

[3] Dickerson *v.* Van Tine, 1 Sandf., 724.

jurisdiction by granting receivers over the estate of a debtor in behalf of his judgment creditors, this extraordinary power is exercised with a considerable degree of caution when the contest is as to the title to real estate, which is in possession of and claimed by third parties. Indeed, courts of equity are always averse to any interference with the legal title *in limine*, and when a creditor's judgment is not of itself a lien upon lands which have been conveyed by the debtor to third parties, and the only equity of the judgment creditor is a right to resort to the lands by setting aside the conveyance from the debtor, the party in possession under what purports to be the legal title will not be deprived of his possession by the appointment of a receiver, unless upon a strong case of danger to the property and inability to respond to a decree because of insolvency.[1] And when a

[1] Vause *v.* Woods, 46 Miss., 120. This was an appeal from an order of the Chancellor, appointing a receiver upon a creditor's bill, to take into possession lands alleged to have been conveyed in fraud of plaintiff, an administrator, and of his intestate in his life-time. The court, Simrall, J., say, p. 128: "As against the legal title, the interposition is with reluctance; it will only be done in case of fraud clearly proved, and danger to the property. Lloyd *v.* Passingham, 16 Ves. Jr., 68, which was a case between two claimants of the title. A summary of the doctrine is stated by the Chancellor in Mays *v.* Rose, Freem. Ch., 718, to the effect that the plaintiff must show a clear right to the property, or that he has some lien upon it, or that the property constitutes a special fund, to which he may resort for satisfaction, or that the property is exposed to loss or waste. It was said by Lord Eldon, in Jones *v.* Pugh, 8 Ves., 71, that if real estate is assets, and the court can not avoid seeing that it and the rents and profits must be responsible, it will put a receiver on the estate. Walker *v.* Denne, 2 Ves. Jr., 170. By the laws of this state, the property of a decedent is chargeable with his debts, primarily the personalty, and, secondarily, the lands; not, however, in the sense that creditors have a specific lien, but in the sense that creditors can subject both to their debts. The descent to the heir, or the right of the devisee, is liable to be divested, if the real estate is required to pay debts. The *gravamen* of the bill is, that the deeds, or other instrumentalities by which the real estate of William G. Vause was passed to, and vested in, the defendants, or some of them, was prompted by covin and fraud, to evade the debt due to the complainants' intestate; and, therefore, said real estate is as much bound

judgment creditor had obtained a conditional order for a receiver over certain real property, alleged to belong to the debtor, but it was shown that the debtor had no such estate in the lands as was claimed by the creditor in his petition, having at the most but an equitable interest in some portion of them, it was regarded as sufficient cause for refusing to make the order for the receiver absolute, the order having covered the entire property.[1]

§ 417. Where, however, a debtor has a life interest in certain real estate, upon which he has with his own funds erected a building and receives the rents thereof, upon a bill by a judgment creditor the court may appoint a receiver of the rents to apply them in payment of the judgment, although the real estate itself is held by trustees and the judgment is no lien thereon, since equity will not permit a debtor to thus evade the payment of his just obliga-

for the debt as though such conveyances had never been made. The judgment conferred no lien on these lands. The equity of the complainants is, a right to resort to the lands, by setting aside these conveyances. The title of the defendants is a valid, legal title, as against all others than the creditor. If the property were worth more than the debt, there would be no reason to put the estate in the custody of a receiver, unless the defendants were committing waste, and deteriorating its value. The court will not interpose for a mortgagee, except upon the ground that the property is insufficient to pay his debt, and, therefore, he should, pending litigation, have the rents and income. Ligon *v.* Bishop *et al.*, 43 Miss., 527. Nor will a receiver be appointed against an executor, on slight grounds. There must be abuse of the trust, or danger of insolvency. Middleton *v.* Dodswell, 13 Ves., 266. The jurisdiction is exerted as part of the preventive justice of the court, mainly in order that the fund or property exposed to spoliation, and danger of loss, pending the litigation, may be taken charge of by the court, so as to abide the litigation. Where the contest is over the title, the defendant, if he has apparently and ostensibly the legal title, will not be deprived of possession unless upon a very strong case of risk of loss of the property, and inability to respond from insolvency to the decree. We have thought it proper to refer to these general principles which govern the jurisdiction of the court."

[1] Tredennick *v.* Graydon, 1 Dr. & War., 316.

tions.[1] Nor will the courts permit a judgment debtor who occupies the position of a *cestui que trust* of lands, under a trust created for his own benefit, to invest his individual property by building upon the land, and thus create a trust in his own property for his own benefit, to the prejudice of his creditors.[2]

§ 418. It was the doctrine of the English Court of Chancery, that upon a bill by creditors claiming satisfaction out of both the real and personal estate of their debtor, if it appeared probable from defendant's answer that there was no personal estate, and both the realty in defendant's possession and its rents and profits must become responsible for the demands, the court might allow a receiver in the first instance, although the power was recognized as a delicate one.[3] And upon a bill by creditors for satisfaction out of the personal assets, and, if these should prove insufficient, out of realty which had descended to an infant heir, a receiver has been allowed over the real estate.[4] So upon a bill by creditors for a sale of real estate for the payment of their demands, the heir at law being an infant, a receiver was granted on application of the plaintiffs.[5] But where an incumbrancer seeks the aid of equity by a receiver over real estate of a defendant, and there are judgment creditors of the defendant in possession, the appointment will be made without prejudice to the rights of such judgment creditors.[6] And a judgment creditor in possession will not be ordered to attorn to a receiver subsequently appointed.[7]

§ 419. It has elsewhere been shown, in discussing the subject of receivers over mortgaged premises, that the courts are always reluctant to interfere with the title of a mort-

[1] Johnson *v.* Woodruff, 4 Halst. Ch., 120, affirmed on appeal to the Court of Errors and Appeals, id., 729.

[2] Johnson *v.* Woodruff, 4 Halst. Ch., 120.

[3] Jones *v.* Pugh, 8 Ves., 71.

[4] Sweet *v.* Partridge, Dick., 696.

[5] Sweet *v.* Partridge, 1 Cox, 433.

[6] Davis *v.* Duke of Marlborough, 1 Swans., 74.

[7] Davis *v.* Duke of Marlborough, 2 Swans., 118.

gagee, the general rule being that a mortgagee in possession, to whom anything is due, will not be disturbed by a receiver, the rule being based upon the reluctance of courts of equity to interfere with the legal title.[1] And as against a mortgagee in possession of the premises, holding them as security for the payment of his debt, the court will not appoint a receiver of the rents and profits, upon a creditor's bill by a judgment creditor of the mortgagor, when the mortgagee has not been paid the amount due him and is able to account and respond for whatever he may receive.[2] So when a mortgagee or trustee of certain property, which has been mortgaged to him by the debtor to secure debts due to the mortgagee and other creditors, is proceeding properly in the discharge of his trust by selling the property and applying the proceeds in payment of the mortgage indebtedness, a court of equity will not interfere by interposing a receiver, upon a creditor's bill filed against the debtor and the mortgagee.[3] But in an action by a judgment creditor to subject the debtor's property to the payment of his debts, if the property is incumbered by numerous mortgages and judgments which are to be ascertained and their priorities determined, and the real estate is insufficient to pay the indebtedness, a receiver may be appointed to take possession of and to rent the property, and to collect the past due rents.[4]

§ 420. As against mortgagees of chattels, equity will extend the aid of a receiver upon the application of judgment creditors, if by reason of the fraudulent conduct of the mortgagee, or otherwise, such interference is necessary to protect the rights of all parties in interest.[5] For example, where creditors have reduced their demands to judgment and have levied upon a stock of goods in the debtor's pos-

[1] See chapter XV, *post*.

[2] Quinn *v.* Brittain, 3 Edw. Ch., 314.

[3] Furlong *v.* Edwards, 3 Md., 99.

[4] Smith *v.* Butcher, 28 Grat., 144. See, also, Grantham *v.* Lucas, 15 W. Va., 425.

[5] Rose *v.* Bevan, 10 Md., 466. And see Gouthwaite *v.* Rippon, 8 L. J., N. S. Ch., 139.

session, they are entitled to an injunction and a receiver to take charge of the stock, as against the debtor and a third person claiming the goods as mortgagee, upon a bill alleging that the goods claimed to be covered by the mortgage are more than sufficient to pay the mortgage debt, and that the debtor has no other property out of which the judgment may be satisfied; the bill also alleging that the mortgagee has permitted the debtor to use and dispose of the goods mortgaged, and that a portion of the stock levied upon is not covered by the mortgage.[1] So where a mortgagee of chattels in possession, having sold a part, and occupying as to the residue the position of a trustee for other creditors, is about to dispose of the residue to the prejudice of a judgment creditor of the mortgagor or original debtor, a receiver may be appointed to take the proceeds of the unsold property, for the purpose of protecting the rights of all parties in interest.[2] But, under a statute authorizing a receiver when the property is in danger of being lost or materially injured or impaired, a debtor having executed a chattel mortgage of his stock of merchandise to creditors having claims nearly equal in amount to the value of the stock, and the mortgagees having taken possession by their agent, who is selling the goods in the usual course of trade, an attaching creditor who has garnished such agent is not entitled to a receiver over the property, when it is not shown that it will not be properly accounted for, or that plaintiff's interest in the proceeds is liable to be impaired.[3]

§ 421. When judgment creditors have, by their judgments, obtained a lien upon the real estate of their debtor, but a receiver is subsequently appointed over his effects and estate, such creditors may, notwithstanding the receivership, maintain an action themselves to set aside as fraudulent and void a mortgage which had been previously given by the debtor, and to apply the proceeds of the property in satisfaction of

[1] Rose v. Bevan, 10 Md., 466.

[2] Gouthwaite v. Rippon, 8 L. J., N. S. Ch., 139.

[3] Silverman v. Kuhn, 53 Iowa, 436.

their judgments, especially when it is alleged that the receiver neglects to act in the premises. But in such case, it is proper to make the receiver a party defendant to the action brought by the creditors, since he has an interest in the land subject to the lien of the judgments, and is entitled to the surplus avails of a sale of the land, if any, after satisfaction of the judgments which were liens thereon.[1] And in England, when a mortgagee of the rates and tolls of a corporation has obtained a receiver in aid of the enforcement of his mortgage, a judgment creditor, though subsequent to the mortgage, may issue an *elegit* upon his judgment, but without prejudice to the rights of the receiver already appointed, or of any other receiver who may be appointed by the mortgagee.[2] But a judgment creditor in possession will not be ordered to attorn to a receiver subsequently appointed in behalf of an incumbrancer.[3]

§ 422. Real estate in possession of a receiver, appointed upon a bill by a judgment creditor to have property of the debtor applied in satisfaction of his judgment, is regarded as being strictly in custody of the court, to abide the final decree which may be rendered in the cause. And in order that the court may be enabled properly to administer the fund, no sale of the property will be allowed on execution under another judgment, without leave of the court first obtained for that purpose. And where such sale was attempted without leave of court, it was held void, and that it passed no title to the purchaser.[4]

[1] Gere *v.* Dibble, 17 How. Pr., 31.

[2] Potts *v.* Warwick and Birmingham Canal Navigation Co., Kay, 142.

[3] Davis *v.* Duke of Marlborough, 2 Swans., 118.

[4] Wiswall *v.* Sampson, 14 How., 52. Mr. Justice Nelson, delivering the opinion, observes as follows, p. 65: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in Angel *v.* Smith, 9 Ves., 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. 1 J. & W., 176,

§ 423. When a debtor makes an assignment of all his property, real and personal, for the benefit of his creditors,

Brooks *v.* Greathed; Daniell's Pr., ch. 39, § 4. And the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed, expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment or to be examined *pro interesse suo;* and this though their right to the possession is clear. 1 Cox, 422; 6 Ves., 287. The proper course to be pursued, says Mr. Daniell, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo;* and an order for such examination may be obtained by a party interested as well where the property consists of goods and chattels, or personalty, as where it is real estate. And the mode of proceeding is the same in case of the receiver. 6 Ves., 287; 9 id., 336; 1 J. & W., 178; Daniell's Pr., ch. 39, § 4. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly. . . It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless. It is true, in ad-

and upon a judgment subsequently obtained against him and a creditor's bill filed thereon, the assignment is set aside as fraudulent and void, and the debtor and his assignees are directed to assign and deliver all the property to the receiver appointed under the creditor's bill, upon compliance with such order the title to the realty becomes vested in the receiver. A judgment, therefore, obtained against the debtor, after the assignment from him to the receiver, does not become a lien upon the land. And in a contest between purchasers at a sheriff's sale under such subsequently acquired judgment, and purchasers at a sale of the same property by the receiver, the latter will be held to have the title, since the lien of the judgment never having attached upon the property, its sale under execution could confer no title upon a purchaser.[1]

§ 424. The rule is otherwise, however, when the purchaser at the sheriff's sale purchases under a judgment recovered against the debtor prior to his assignment of his property to the receiver, even though such judgment be of a later date than that on which the creditor's bill was filed and the receiver appointed. And in such a case, as between the purchaser at the sheriff's sale, and a purchaser under the receiver, the former will acquire the title. The reason for the distinction is found in the fact that the purchaser at the

ministering the fund, the court will take care that the rights of prior liens or incumbrances shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand? . . As we have already said, it is sufficient for the disposition of this case, to hold, that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose. And upon this ground, we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

[1] Chautauque County Bank *v.* White, 6 N. Y., 236, reversing S. C., 6 Barb., 589.

receiver's sale derives his title, not under the judgment on which the receiver was appointed, but from the debtor's own conveyance of his property to the receiver and the subsequent sale by that officer. And since the debtor can only convey his property to the receiver subject to the lien of existing judgments, a sale under an existing judgment confers a better title than can be derived through the debtor and the receiver. The conclusion, therefore, to be drawn from the cases, would seem to be that a receiver can not acquire title to real property of the debtor free from the liens of other judgment creditors, when such liens had attached before the assignment of his real estate by the debtor to his receiver.[1]

§ 425. It would seem that a discharge of the debtor in bankruptcy is not a sufficient defense to a creditor's bill seeking a receiver for the enforcement of a judgment acquired after the discharge was granted, when the defendant appeared and contested the action in which the judgment was obtained and did not plead his discharge in bar, and when no application has been made by the debtor to have the execution set aside because issued upon a judgment recovered subsequent to his discharge. Under such circumstances, the debtor having neglected to avail himself of his opportunity to take advantage of the discharge at the proper time, he will not be allowed to urge it against the appointment of a receiver upon the judgment remaining in full force.[2]

§ 426. Under the English bankrupt act of 1861, when an insolvent debtor has executed a deed of inspectorship for the benefit of his creditors, covenanting to deal with his property according to the directions of the inspectors, upon a bill filed by them alleging that he is violating such covenants and hindering the settlement of his affairs with his creditors, and that he is receiving and applying funds to his

[1] Chautauque County Bank *v.* Risley, 19 N. Y., 369. See, also, Shand *v.* Hanley, 71 N. Y., 319.

[2] Steward *v.* Green, 11 Paige, 535.

own use, a receiver will be appointed on the ground of preventing irreparable mischief to the creditors. And under such circumstances, the court may properly interfere by a receiver, even though the property may ultimately have to be distributed in bankruptcy, and although the bankrupt court might possibly afford the same relief.[1]

§ 427. Equity will not lend its aid by a receiver when the granting of the relief would have the effect of interfering with the administration of the assets of a deceased debtor, against whom the judgment was obtained in his life-time. Thus, in the case of a judgment obtained and creditor's bill filed thereon during the debtor's life-time, and after his death the creditor's suit is revived against his administrator, the court will not grant a receiver of the effects of the deceased upon the application of plaintiff in the creditor's suit, since the property is to be disposed of in due course of administration according to law, and any priority which plaintiff may have gained by filing his bill dies with the death of defendant.[2]

§ 428. When a judgment debtor is conducting a business in the name of his wife, and ostensibly as her agent, in which he is aided by his sons who are minors, the business being wholly conducted and managed by the debtor and his sons, his interest is regarded as sufficient to warrant a court of equity in appointing a receiver to collect and preserve the assets, upon a bill by a judgment creditor showing that defendants are winding up the business, selling the

[1] Riches *v.* Owen, L. R., 3 Ch. App., 820. As to the power of a court of bankruptcy, after an adjudication and before an assignee is selected, to appoint a receiver for the temporary custody of the bankrupt's estate, and as to the rights of action of such a receiver, see Lansing *v.* Manton, 14 Bank. Reg., 127.

[2] Sylvester *v.* Reed, 3 Edw. Ch., 296; Mathews *v.* Neilson, id., 346. But in the latter case, it is said that if a receiver had already been appointed and had obtained possession of property or money of the debtor before his death, the court appointing him, having possession through its officer, would not part with that possession to the executor or administrator, but would apply the fund in payment of the judgment, due regard being had, however, to the statutory rights of other creditors.

property and collecting the credits. But it is error, in such a case, to direct the receiver to pay the creditors of defendants out of collections and sales made by him, before it is finally determined whether they are entitled to priority of payment out of the funds; since, even if they are entitled to priority, it is premature to direct the payment before their claims have been ascertained and allowed by the court. And before such direction is given, an account should be taken and an opportunity afforded to prove the claims of creditors upon the one hand, and to contest them upon the other.[1]

§ 429. Courts of equity sometimes exercise a discretionary power as to the amount of the debtor's property over which a receiver shall be appointed, or as to ordering an immediate sale for the purpose of satisfying the demands of judgment creditors. And when a receiver was appointed of the effects of a defendant debtor in several creditors' suits, the entire amount of the judgments being about $1,000, and the receiver took possession of the debtor's property, amounting to about $60,000, the court was of opinion that it would be proper for the receiver to forbear selling at public auction, and he was directed to stay such sale until further order of the court.[2] And when, under an act of parliament authorizing receivers of the property of a judgment debtor in aid of his creditors for the enforcement of their judgments, the court is vested with a discretion in limiting the quantity of the estate over which the receiver shall be extended, it will not appoint a receiver, for the enforcement of a small demand, over the whole of a large estate, but only over a portion sufficient to satisfy the indebtedness within a reasonable period. And under such a statute, when a receiver has been appointed over a part of defendant's estate, he may be extended over the remainder in behalf of another creditor who comes in for protection, thus saving the expense of a new appointment,

[1] Penn *v.* Whiteheads, 12 Grat., 74.

[2] Wardell *v.* Leavenworth, 3 Edw. Ch., 244.

and such extension will be regarded as, in effect, an original appointment.[1]

§ 430. As regards priority of right between a judgment creditor and a mortgagee of the debtor, it is held, where the judgment is only a lien upon the lands of defendant to the extent of such estate or interest as defendant had in them, that the judgment creditor is not entitled to payment out of funds received by the receiver, in preference to interest due upon mortgages of the land which are prior to his judgment.[2]

§ 431. When a fund has already come into the hands of the court through the medium of a receiver, but the bill on which the appointment was made is afterward dismissed upon demurrer, a judgment creditor is entitled to a receiver upon a bill showing a judgment and levy upon the property, and that it is the only property of defendant within the jurisdiction of the court out of which his judgment can be satisfied, and that there are conflicting claims thereto which may defeat his ultimate recovery unless the fund is placed in the hands of a receiver.[3]

§ 432. As regards the nature or specific kind of property over which a receiver may be appointed for the protection of judgment creditors, it would seem from the general scope and tenor of the decisions, that such a receivership may properly extend to property of any nature, real or personal, in which the debtor has such an interest as may avail his creditor. In New Jersey, it has been held that a receiver under a creditor's bill may be appointed to take charge of rings and jewelry of the defendant, since these are articles usually worn upon the person, and it might be out of the sheriff's power to levy on and take

[1] Corbet *v.* Mahon, 2 Jo. & Lat., 671. And see, as to priority and right to the rents as between judgment creditors and mortgagees in such a case, Abbott *v.* Stratten, 3 Jo. & Lat., 603.

[2] Holland *v.* Cork & Kinsale R. Co., Ir. Rep., 2 Eq., 417.

[3] Fields *v.* Jones, 11 Ga., 418.

possession of them.[1] And in New York, on proceedings supplementary to execution under the code of procedure, when the debtor upon examination disclosed certain property consisting of notes in an insolvent firm, and an interest in an existing firm of which he was a member, the court regarded it as an eminently proper case for a receiver to take charge of the debtor's effects and to collect what was due to him.[2] In England, a judgment creditor of a beneficed clergyman, whose judgment is, under acts of parliament, a lien upon the benefice or living of the clergyman, is entitled to the aid of equity by a receiver to collect the rents and emoluments pertaining to such living.[3]

§ 433. A receiver will not be appointed of the effects of a defendant, upon a bill filed by one claiming to be a creditor, when the answer positively alleges that there is nothing due from defendant to plaintiff, and when no other creditors appear in support of the application.[4] And when the court has reasonable ground to suspect irregularities in the judgment or execution on which the creditor's bill is founded, it may delay the application for a receiver for a sufficient time to enable the irregularity to be determined in the court where the judgment was rendered, with leave to renew the application at a future time.[5] So the relief will be denied when the bill contains no distinct charges of fraud, and when it does not appear clearly and distinctly that there is any property or thing in action to be preserved for the benefit of the judgment creditor.[6] But when the bill charges that the judgment debtor has choses in action and property which should be subjected to the payment of

[1] Frazier *v.* Barnum, 4 C. E. Green, 316.

[2] Webb *v.* Overmann, 6 Ab. Pr., 92.

[3] Hawkins *v.* Gathercole, 1 Sim., N. S., 63.

[4] Fogarty *v.* Burke, 1 Con. & Law., 565.

[5] Bank of Wooster *v.* Spencer, Clarke Ch., 386.

[6] First National Bank *v.* Gage, 79 Ill., 207. See, *contra*, Gage *v.* Smith, 79 Ill., 219, where it is held that the appointing of a receiver upon such a bill is almost a matter of course, as under the former chancery practice in New York under similar legislation concerning creditors' bills.

his indebtedness, and the bill is taken as confessed against the debtor, it is not error to appoint a receiver.[1]

§ 434. The fact that plaintiff in a creditor's bill, seeking the appointment of a receiver, sees fit to waive the answer of defendant under oath, affords no sufficient objection to granting a receiver in the action, and to making an order of reference for the examination of defendant on oath before a master in chancery, with respect to the property which he is required to assign to the receiver.[2]

§ 435. When a defendant in a creditor's bill, filed by a receiver of the estate of a deceased person, admits by his answer a balance of money in his hands belonging to the estate of the deceased, he should be directed to pay the fund into court without waiting for a final decree. And such fund may either be kept in the custody of the court, or invested under its special direction, as the court may see fit.[3]

§ 436. It is to be observed that courts of equity are always averse to appointing receivers upon an *ex parte* application, and without due notice to defendants whose rights are to be affected. And a receiver will not be appointed *ex parte* upon a creditor's bill, when it is not shown that defendant has any property of a perishable nature, or choses in action which are in danger of being lost unless immediately collected; or that any other special circumstances exist, which render it necessary to put a receiver in immediate possession of the debtor's property.[4]

§ 437. When there are prior creditors, parties to the cause, having claims upon an estate which is put into the hands of a receiver, although the plaintiff on whose application the receiver was appointed subsequently dismisses his bill and consents to the receiver's discharge, the court will yet protect the rights of such prior creditors by continuing the receiver; and it may require them to file a bill forthwith, as a condition of thus affording them protection.[5]

[1] Runals *v.* Harding, 83 Ill., 75.

[2] Root *v.* Safford, 2 Barb. Ch., 33.

[3] Rutherford *v.* Jones, 26 Ga., 150.

[4] Sandford *v.* Sinclair, 8 Paige, 373, affirming S. C., 3 Edw. Ch., 393.

[5] Murrough *v.* French, 2 Mol., 497.

§ 438. Upon supplementary proceedings under the code of procedure in Wisconsin, to enforce a judgment or decree for alimony rendered in an action for a divorce, the court may appoint a receiver to take possession of the effects of defendant in the divorce proceeding; and the sheriff's return of *nulla bona* upon the execution for alimony, if made and signed before the supplementary proceedings are instituted, is sufficient foundation therefor, although the execution is not filed with the clerk until after such proceedings are begun. And the receiver thus appointed may maintain an action to set aside a fraudulent conveyance of his real estate, made by the defendant to defeat the decree for alimony.[1]

§ 439. A receiver has been allowed in the Irish Court of Chancery, in aid of a judgment creditor who had obtained a judgment in another court, the security for which was only a life estate which might lapse at any moment; there being also large prior incumbrances, and the defendant having sold his stock and furniture and gone abroad to avoid payment of the judgment.[2]

[1] Barker *v.* Dayton, 28 Wis., 367.

[2] McCraith *v.* Quin, Ir. Rep., 7 Eq., 324.

II. Of the Receiver's Title.

§ 440. In considering the nature of the title to the debtor's property and estate, which is acquired by a receiver appointed in behalf of judgment creditors, the first principle to be observed is that the appointment of the receiver does not operate to divest liens previously acquired on the property of the debtor by other creditors acting in good faith. The appointment is regarded as being made subject to such rights and liens as may have been previously acquired by

other judgment creditors, who will not be divested of their liens by virtue of the subsequent receivership.[1] For example, a judgment creditor is entitled to the enforcement of his lien against the personal property of his debtor, and to the fruits of a levy made thereon, notwithstanding the subsequent appointment of a receiver of the debtor's effects in a creditor's suit; since, until such appointment is actually made, there is no such lien by virtue of the creditor's suit upon the personal property of the debtor, as to prevent a levy and sale under execution.[2] So when a sheriff has made a valid levy upon the debtor's property under a judgment against him, and a receiver is subsequently appointed over the debtor's estate, the receiver takes his title subject to the rights acquired under the levy. And in such a case, when the receiver agrees with the sheriff, that if the latter will desist from sale under his levy and will permit the receiver to sell, he will pay the plaintiff in execution, or the sheriff for his use, the amount of such execution, if it shall be determined that plaintiff's levy was a prior lien, such agreement may be enforced by action against the receiver.[3] So creditors, who have by their judgments acquired a lien upon their debtor's real estate prior to the appointment of a receiver over his estate, may maintain an action to set aside a fraudulent mortgage executed by the debtor; since the receiver's appointment, being subsequent to the lien of their judgments, does not divest them of their right of action.[4] And, in general, it may be said that a receiver over a debtor's property occupies the same relation toward the proceeds or fund derived from the property as the debtor himself.[5]

§ 441. As regards property of the debtor which is exempt by law from levy and sale under execution, the doctrine

[1] Becker *v.* Torrance, 31 N. Y., 631; Davenport *v.* Kelly, 42 N. Y., 193; Gere *v.* Dibble, 17 How. Pr., 31. And see Van Alstyne *v.* Cook, 25 N. Y., 489.

[2] Davenport *v.* Kelly, 42 N. Y., 193. And see Van Alstyne *v.* Cook, 25 N. Y., 489.

[3] Becker *v.* Torrance, 31 N. Y., 631.

[4] Gere *v.* Dibble, 17 How. Pr., 31.

[5] Crine *v.* Davis, 68 Ga., 138.

established by the courts of New York is that a receiver appointed on proceedings supplementary to execution under the code, in the nature of an ordinary creditor's bill under the former chancery system, acquires no title by virtue of his appointment to such property.[1] And the rule holds good, even though the order of appointment is in general terms, without excepting exempted property; since such order, however broad in its language, must be understood as limited in its operation by the statute exempting the property from execution, and the law attaches to the order and becomes a part of it. A judgment debtor may, therefore, maintain an action against his receiver, for property taken by the latter which is exempt from sale under execution.[2]

§ 442. The doctrine as stated in the preceding section is not limited in its application to the property itself which is exempted by law from sale under judicial process, but extends also to the proceeds of insurance realized upon the property when destroyed by fire.[3] And when property of the debtor, which is exempt by law from sale under execution, is destroyed by fire subsequent to the appointment of the receiver, the right of action for the insurance does not vest in the receiver, and he has no interest therein.[4] And a receiver of a judgment debtor will not be allowed an order, directing the debtor to assign to him a policy of insurance upon furniture of the defendant, which was exempt from execution and which has been destroyed by fire; since, in such case, the debtor has not voluntarily parted with or waived his right to the exempted property.[5] The doctrine is also extended to the case of a judgment for damages, recovered by the debtor against a creditor who had seized

[1] Finnin *v.* Malloy, 33 N. Y. Supr. Ct. R., 382; Cooney *v.* Cooney, 65 Barb., 524. See, also, Tillotson *v.* Wolcott, 48 N. Y., 188.

[2] Finnin *v.* Malloy, 33 N. Y. Supr. Ct. R., 382.

[3] Cooney *v.* Cooney, 65 Barb., 524; Sands *v.* Roberts, 8 Ab. Pr., 343.

[4] Sands *v.* Roberts, 8 Ab. Pr., 343.

[5] Cooney *v.* Cooney, 65 Barb., 524.

and sold property which was exempt from execution, the judgment being regarded as representing the property, for the value of which it was recovered. A receiver, therefore, who has collected such a judgment, will be ordered to release it in favor of the debtor.[1]

§ 443. Under the former chancery practice in New York, it was customary, upon the appointment of a receiver in aid of a creditor's bill, to require the defendant to execute an assignment to the receiver of all his property and effects, and a similar practice has been followed in other states retaining the chancery system. While there was some doubt, under the New York decisions, as to whether such an assignment was not really necessary to vest in the receiver the title to real estate of the debtor,[2] yet as regards personal property, choses in action, and equitable interests of the debtor, the assignment was regarded merely as a matter of convenience, the established doctrine being that as to all such property and interests the title passed to the receiver by virtue of his appointment, without the intervention of or any necessity for a formal assignment from the debtor.[3] Especially was this the case with regard to equitable interests and choses in action in favor of the debtor, as to which it was held that an assignment could transfer no additional or higher right than the receiver had by virtue of his appointment.[4] And when a receiver was appointed over the estate of three defendants in a creditor's bill, only two of whom joined in an assignment of their property to the receiver, he was held to be invested with the title to the personalty, so as to maintain an action of trover therefor. Such a receiver was held to have a clear priority over purchasers of the same property, under execution on a judgment recovered subsequent to the appoint-

[1] Tillotson *v.* Wolcott, 48 N. Y., 188.

[2] See Wilson *v.* Wilson, 1 Barb. Ch., 594.

[3] Storm *v.* Waddell, 2 Sandf. Ch., 505; Iddings *v.* Bruen, 4 Sandf. Ch., 252; Wilson *v.* Allen, 6 Barb., 542. See, also, Mann *v.* Pentz, 2 Sandf. Ch., 272; Albany City Bank *v.* Schermerhorn, Clarke Ch., 297.

[4] Iddings *v.* Bruen, 4 Sandf. Ch., 252.

ment of the receiver, and to be entitled to recover the property from such purchasers.[1] And the property being thus under the control of the court, through its officer the receiver, the court would not permit judgment creditors to levy thereon for the satisfaction of their judgments, and a sheriff making such a levy was held in contempt of court.[2]

§ 444. As regards the property which passes to the receiver by virtue of an assignment from the debtor, under an order of court appointing a receiver of the money, property, things in action and effects of the defendant, nothing passes under the general words of assignment, except property or things in action in which the defendant had some beneficial interest at the time of making such assignment. It is not necessary, therefore, that it should contain an express reservation of property which the debtor holds merely in the character of trustee for others, under a valid and subsisting trust, and in which he has no beneficial interest. Nor is it necessary to expressly except from the operation of the assignment property which the debtor had before assigned to the receiver, who had been appointed in a previous creditor's suit. Such an assignment, however, should contain an exception reserving to the debtor such property as he is entitled to hold exempt from levy and sale under execution; and this should be done, even though the order appointing the receiver and directing the debtor to assign and deliver over his property is expressed in general terms, without excepting any exempted property.[3] But a mere right of action in favor of a debtor for a personal tort, since it can not be reached by plaintiff in a creditor's bill, is not an asset which will pass to a receiver appointed on such bill, by virtue of the assignment made by the debtor to the receiver.[4]

§ 445. The fact that there were irregularities in the appointment of a receiver upon a creditor's bill in aid of a

[1] Wilson v. Allen, 6 Barb., 542.

[2] Albany City Bank v. Schermerhorn, Clarke Ch., 297.

[3] Cagger v. Howard, 1 Barb. Ch., 368.

[4] Hudson v. Plets, 11 Paige, 180.

judgment at law, affords no justification upon a motion for an attachment against the defendant, for not appearing before a master in chancery to make an assignment of his property to the receiver, and to submit to an examination. The proper course for a defendant, desiring to take advantage of such irregularities, is to move to set aside the appointment, and for an order staying the proceedings before the master in the meantime.[1]

§ 446. When a receiver is appointed upon a creditor's bill, and defendants are ordered to assign to him all their property, assets, and choses in action, they will be compelled to make a formal assignment to the receiver to enable him to test the validity of any disposition which they may have made of their property, and to bring suits in relation thereto, even though they have sworn that they have no property.[2] In such event, however, nothing will be required beyond a formal assignment, unless it is made to appear by other testimony that the debtors have sworn falsely as to their property and effects.[3] And it has been held that an assignment by a judgment debtor to a receiver of his effects appointed on a creditor's bill, partakes of the nature of a mortgage for the payment of the judgment and costs, and when this purpose is attained the assignment has no further force, and that no re-assignment to the debtor is necessary.[4]

§ 447. Under the New York code of procedure, upon the appointment of a receiver of the effects of a judgment debtor on proceedings supplementary to execution, no assignment is necessary to invest the receiver with the title to the debtor's personal property or choses in action; since such title vests at once in the receiver by virtue of his appointment, and no subsequent act or assignment by the debtor to a third party can divest the lien thus acquired in the

[1] Howard *v.* Palmer, Walk. (Mich.), 391.

[2] Chipman *v.* Sabbaton, 7 Paige, 47.

[3] Chipman *v.* Sabbaton, 7 Paige, 47.

[4] Anderson *v.* Treadwell, Edmond's Select Cases, 201.

creditor's suit.[1] The rule prevails also with regard to real estate of the debtor, although the contrary was formerly held,[2] and it is now the recognized rule that the receiver, by virtue of his appointment, becomes vested with all the title to the debtor's property, both real and personal, without the execution of any assignment from the debtor, no distinction being made between realty and personalty.[3] The doctrine, however, would seem to be limited to property actually in the possession of the debtor, and it is held that the appointment does not invest the receiver with title to property previously transferred or assigned by the debtor in fraud of his creditors. As to such property, it is held, he can acquire no title by succession to the rights of the debtor, since the transfer is valid as to him, and the fraudulent assignee acquires a good title to the property as against the debtor and all other persons, except the creditors of the debtor. As to such property, therefore, the receiver's only right is a right of action, as trustee for the creditors, to set aside the fraudulent transfer and to recover the property, for the benefit of the judgment creditors, at whose suit he was appointed.[4] And if, in such case, the receiver takes no steps to

[1] Porter *v.* Williams, 5 How. Pr., 441; People *v.* Hulburt, id., 446; S. C., 1 Code R., N. S., 75. And see Fessenden *v.* Woods, 3 Bosw., 550.

[2] See Moak *v.* Coats, 33 Barb., 498, where it was held that the title to the personalty only passed to the receiver by virtue of his appointment, and that the title to the realty did not vest in him until an assignment was executed by the debtor. It was, therefore, held that where the debtor had sold and conveyed real estate to a purchaser in good faith and for value, although after the receiver was appointed, the debtor not having made an assignment to the receiver, the latter could not maintain an action of ejectment against the purchaser. And to the same effect is Scott *v.* Elmore, 10 Hun, 68. It is believed, however, that the doctrine of these cases is entirely overthrown by Porter *v.* Williams, 9 N. Y., 142.

[3] Porter *v.* Williams, 9 N. Y., 142; Wing *v.* Disse, 15 Hun, 190; Manning *v.* Evans, 19 Hun, 500. And see Fessenden *v.* Woods, 3 Bosw., 550.

[4] Bostwick *v.* Menck, 40 N. Y., 383; Olney *v.* Tanner, 10 Fed. Rep., 101, affirmed on appeal, 21 Blatchf., 540. And a receiver, under the statutes of New Jersey, may file a bill in his own name to set aside a fraudulent transfer of the judgment debtor's property. Miller *v.* Mackenzie, 29 N. J. Eq., 291.

set aside such assignment until after the debtor is adjudicated a bankrupt and an assignee of his estate is appointed, the receiver can not then maintain an action to set aside the assignment and to recover the assets.[1]

§ 448. Since a receiver, in proceedings supplementary to execution, acquires title to the debtor's property by virtue of his order of appointment, which order divests all the title and interest of the debtor and vests it in the receiver, his title takes precedence over that of a judgment creditor who levies an execution subsequent to the receiver's appointment. The receiver may, therefore, maintain an action for the recovery of property so levied upon and sold, and may recover its value with interest from the time of sale. Nor is the receiver's title to the property, or his right of action for its recovery, defeated because of his delay in taking possession until after levy of the execution, when no fraud or collusion is shown, and when there is no evidence that the delay of the receiver in taking possession was by the consent or direction of the creditors at whose instance he was appointed.[2]

§ 449. As regards the title to choses in action of the debtor, as between the receiver and an assignee or purchaser from the debtor, who purchases subsequent to the filing of the creditor's bill and with notice thereof, it was held, under the former chancery practice in New York, that the title acquired by the receiver was superior to that of the purchaser, and would prevent the latter from maintaining a bill in equity for the enforcement of the chose in action.[3] Under the code of procedure, it would seem that a receiver, appointed in supplementary proceedings, acquires title to such property only of the debtor as belonged to him at the time the proceedings were instituted.[4]

§ 450. An order appointing a receiver in a creditor's suit

[1] Olney *v.* Tanner, 10 Fed. Rep., 101, affirmed on appeal, 21 Blatchf., 540.

[2] Fessenden *v.* Woods, 3 Bosw., 550.

[3] Weed *v.* Smull, 3 Sandf. Ch., 273.

[4] Campbell *v.* Genet, 2 Hilt., 290.

does not invest him with title to any part of the income of a trust fund, to accrue to the debtor after the date of the receiver's appointment, which fund is devised to the debtor and is inalienable in his hands.[1] And in New York, a receiver appointed in proceedings supplementary to execution can not maintain an action in the nature of a creditor's suit to recover the interest of the judgment debtor as a beneficiary in a trust fund, the trust having been created by a person other than the debtor, nor can the receiver reach the surplus of such fund, beyond what is required for the support of the beneficiary.[2]

§ 451. In New York, where the common-law estate by curtesy is still recognized, it is held that the estate thus acquired by the husband upon the death of his wife intestate after issue born, is such an estate or interest as will pass to a receiver of the husband, on proceedings against him by a judgment creditor. And the receiver is entitled to recover the rent due on account of such estate at the period of his appointment, and all rent accruing afterward and until the expiration of his receivership.[3]

§ 452. Under the code of procedure in North Carolina, when a receiver is appointed in supplementary proceedings in aid of a judgment creditor, but the debtor dies before the appointment is actually made, the receiver does not acquire title to the debtor's effects, and the judgment creditor does not become entitled to any priority therein, the laws of the state having fixed the distribution of the assets of a deceased among his creditors.[4]

[1] Graff *v.* Bonnett, 31 N. Y., 9, affirming S. C., 2 Rob. (N. Y.), 54.

[2] Campbell *v.* Foster, 35 N. Y., 361; McEwen *v.* Brewster, 17 Hun. 223. See, also, Manning *v.* Evans, 19 Hun, 500.

[3] Beamish *v.* Hoyt, 2 Rob. (N. Y.), 307.

[4] Rankin *v.* Minor, 72 N. C., 424.

III. Of the Receiver's Functions and Rights of Action.

§ 453. In appointing receivers over the property and effects of a debtor, upon the application of his judgment creditors, it is usual for the order of appointment to fix in general terms the functions and duties of the receiver, and these are subject to modification or enlargement by further order of court, from time to time, as the exigencies of the case may demand. These functions usually embrace the receiving of whatever property and effects may belong to the debtor; the collection of debts and demands due to him, and the prosecution of suits for this purpose when necessary; and the payment into court of the proceeds, to be applied in satisfaction of the judgment in aid of which he was appointed. And under the rules of court prevailing under the former chancery practice in New York, a receiver appointed in aid of a creditor's bill was vested with a general power to sue for all demands due to the debtor. And it would seem that he might institute such actions *suo motu*, merely obtaining the consent of the creditors for his own protection as to the question of costs.[1]

§ 454. As regards the general functions and rights of action of a receiver in proceedings supplementary to execution under the New York code of procedure, and in other states which have adopted the same practice, the established doctrine is, that such receiver is not the mere agent or representative of the debtor, but occupies the relation of a trustee for the creditors in whose behalf he is appointed.[2] He is, therefore, entitled to enforce the rights of such cred-

[1] Green *v.* Bostwick, 1 Sandf. Ch., 185. As to the right of a receiver appointed in proceedings supplementary to execution, under the New York code of procedure, to maintain an action for the partition of real estate of the judgment debtor, see Dubois *v.* Cassidy, 75 N. Y., 298.

[2] Bostwick *v.* Menck, 40 N. Y., 383. See Same *v.* Same, 4 Daly, 68, reversing S. C., 8 Ab. Pr., N. S., 169. In Porter *v.* Williams, 9 N. Y., 142, it is said that such a receiver is a "trustee for all parties," but the language would seem to be too broad, in view of the decision in Bostwick *v.* Menck, which limits the receiver's functions to those of a representative or trustee for the creditors, in whose behalf he was appointed, excluding others who had not joined in the proceedings.

itors to the extent necessary for the satisfaction of their demands.[1] And for this purpose, he may institute actions in his own name to set aside fraudulent assignments or transfers of his property, made by the debtor with a view of defeating his creditors, and may recover the property so transferred for the purpose of applying it in satisfaction of the judgments.[2] And in such case, the pendency of the supplementary proceedings is no bar to the receiver's action to set aside the fraudulent conveyance, since the object of the former proceeding is to reach such property of the judgment debtor as is not claimed adversely, while the purpose

[1] Bostwick *v.* Menck, 4 Daly, 68, reversing S. C., 8 Ab. Pr., N. S., 169; Manley *v.* Rassiga, 13 Hun, 288.

[2] Porter *v.* Williams, 9 N. Y., 142; Bostwick *v.* Menck, 40 N. Y., 383; Manley *v.* Rassiga, 13 Hun, 288; Hamlin *v.* Wright, 23 Wis., 491. But see, *contra*, Higgins *v.* Gillesheiner, 26 N. J. Eq., 308. The earlier doctrine of the supreme court of New York was directly the reverse, and it was held that the receiver's functions were limited to the control of property of which the debtor had possession, either actual or constructive, at the time of appointment, and that he could not maintain an action to set aside a fraudulent assignment made by the debtor prior to the receivership, or to recover the property so assigned, and that the remedy must be sought in an action by the judgment creditor himself. Seymour *v.* Wilson, 16 Barb., 294; Hayner *v.* Fowler, 16 Barb., 300. Seymour *v.* Wilson was, however, reversed by the court of appeals on other grounds (14 N. Y., 567), the court not passing upon any of the points decided below. And the opinion of the court of appeals in Porter *v.* Williams, 9 N. Y., 142, may be regarded as setting the question at rest in New York, and firmly establishing the doctrine enunciated in the text. The court, Willard, J., say, p. 150: "The act which the receiver seeks to avoid, in this case, was an illegal act of the debtor. The object of the action is to set aside an assignment made by the debtor with intent, as alleged, to defraud the creditor under whose judgment and execution the plaintiff was appointed receiver, and the other creditors of the assignor. Such conveyance was void at common law, and is expressly forbidden by the statute. It is void as against the creditors of the party making it, though good as between him and his grantee. The plaintiff, representing the interest of the creditors, has a right to invoke the aid of the court to set aside the assignment. He stands, in this respect, in the same condition as the receiver of an insolvent corporation, or as an executor or administrator, and like them can assail the illegal and fraudulent acts of the debtor whose estate he is appointed to administer."

of the latter is to reach property claimed adversely and which can not be reached by the supplementary proceedings. And in such an action, it is proper to join all the fraudulent grantees as defendants, since the fact of their being accessory to the debtor's fraudulent attempt to place his property beyond reach of his creditors, gives them such a common connection with the subject-matter of the suit that they may all be joined as defendants, although they purchased at different times, and each is charged only with the fraud in his own purchase.[1] Such a receiver may also maintain an action to remove a cloud upon the title of the judgment debtor, and to sell the property on execution under the judgment upon which the receiver was appointed.[2] But the receiver is not the representative of the creditor for the purpose of enforcing a trust created by statute in favor of the creditors of a debtor who pays the consideration for lands which are conveyed to another, since, in such case, the debtor acquires no legal or equitable interest in the land, and the creditor may proceed directly to enforce the trust.[3]

§ 455. It is further to be observed, with reference to the functions of receivers in the class of actions under consideration, and their right of action to set aside fraudulent assignments made by the debtor, that the receiver is regarded as a trustee for the creditors only in whose behalf he has been appointed, and that he can maintain his action only to the extent necessary to satisfy their judgments, and no further. His rights of action in this respect are precisely such as the creditors themselves might have maintained, and no more; and since he succeeds to their rights of action, he can maintain a suit to set aside assignments in fraud of their rights, only to the extent necessary to satisfy their demands and costs, and has no right to interfere with the transfer

[1] Hamlin *v.* Wright, 23 Wis., 491.

[2] Wright *v.* Nostrand, 94 N. Y., 31. And see this case as to the requisite proof of the receiver's appointment in such case.

[3] Underwood *v.* Sutcliffe, 77 N. Y., 58.

beyond this.[1] And when the receiver, after instituting an action to set aside a fraudulent conveyance made by the

[1] Bostwick v. Menck, 40 N. Y., 383. See, also, Olney v. Tanner, 10 Fed. Rep., 101, affirmed on appeal, 21 Blatchf., 540; Goddard v. Stiles, 90 N. Y., 199; Righton v. Pruden, 73 N. C., 61. Bostwick v. Menck, 40 N. Y., 383, was an action brought by a receiver appointed in behalf of a judgment creditor to set aside a fraudulent assignment of the debtor's property. The judgment on which the receiver was appointed was for about $200, and the decree directed the defendant to pay over to the receiver all the avails of the assigned property, amounting to $15,000, except such as he had distributed under the assignment before the suit was brought. The judgment was reversed on appeal, Grover, J., holding as follows, p. 385: ". . The only right of the receiver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder, and the receiver is, by law, invested with all the rights of all the creditors represented by him in this respect. It is clear that the right of the receiver representing the creditors, and acting in their behalf, is no greater than that of the creditors. What, then, are the legal and equitable rights of a creditor as to property fraudulently transferred? Manifestly only to treat as void and set aside such transfer, so far as shall be necessary to satisfy his debt and costs. He has no right to interfere with the transfer beyond this. When his debt and costs are paid, the transfer is as valid as to him as to other persons. If this be the extent of the rights of a single creditor, and all that can be conferred upon a receiver appointed by law to act as his trustee, it is clear that the right is not enlarged by the appointment of the same person as receiver for several creditors. The receiver is then trustee for all, clothed with power to set aside transfers fraudulent as against the demands represented by him, only to an extent sufficient to satisfy such demands and costs. When this is done, his duties, and consequently his powers and right to act further in behalf of the creditors, cease as to property that has been transferred by the debtor. As to property owned by the debtor at the time of the appointment, we have seen that the rule is different; that, as to such property, the appointment vests the legal title to the whole in the receiver, and he may consequently assert his title thereto without regard to the amount of the judgments upon which he has been appointed." And Mr. Justice James, in the same case, p. 389, says: "It was not the purpose of this provision of the code to seize upon and sequestrate the judgment debtor's estate for the benefit of all his creditors. Its purpose was to furnish a cheap and easy mode of discovering the concealed property of a judgment debtor, and applying it to the satisfaction of the judgment or judgments in which proceedings were

debtor, is appointed receiver of the estate of the same debtor in subsequent proceedings by other judgment creditors, he can not unite the rights of such subsequent creditors with the former action by a supplemental bill or complaint.[1] So the receiver being appointed only for the benefit of the judgment creditor instituting the proceeding, his right of action to recover the debtor's property terminates when the judgment upon which he was appointed is paid, and he then becomes *functus officio*.[2] And it is improper to direct the receiver to pay other judgments than those upon which he was appointed, without notice to the debtor, and with no opportunity to him to be heard, since the receiver does not represent the debtor as to such other judgments.[3]

§ 456. The functions and powers of the receiver, as regards rights of action to set aside fraudulent transfers made by the debtor, being limited to such rights of action as the judgment creditor might himself have maintained, he can not effect a result which the creditor himself could not have effected; since he stands in the place of the judgment creditor, and is limited by any acts or conduct on his part which would have barred proceedings by the creditor himself. And when the creditor is estopped by his own act from proceeding against the debtor or his assignee, to set aside a fraudulent assignment of the debtor's property, such estoppel applies equally as against the receiver, appointed in aid of such creditor. For example, when a debtor purchases property with the intention of assigning it to defraud the vendor, and carries this intention into execution, if the vendor, instead of disaffirming the sale and suing for the wrongful conversion, elects to affirm the contract and sues for the purchase price, after judgment thereon and the ap-

taken. When property enough to satisfy such judgment or judgments is reached, the purpose of the appointment of a receiver is accomplished; that officer owes no duty to other creditors of the debtor."

[1] Bostwick *v.* Menck, 4 Daly, 68, reversing S. C., 8 Ab. Pr., N. S., 169.

[2] Righton *v.* Pruden, 73 N. C., 61.

[3] Goddard *v.* Stiles, 90 N. Y., 199.

pointment of a receiver in aid of the judgment, the receiver will not be allowed to maintain an action to set aside the fraudulent assignment.[1]

§ 457. Since the receiver, in this class of cases, is vested with the same rights of action to set aside fraudulent transfers by the debtor as the creditors whom he represents, he can not take, or authorize others to take, forcible possession of property previously assigned by the debtor to a third person, when the property was actually transferred under a sale valid as between the debtor and the vendee. The only right of the receiver, in such a case, is a right of action to set aside the transfer; and it constitutes no defense to an action of trespass, brought by the purchaser of the property from the debtor, that the defendants, who had taken forcible possession of the property, acted under the direction of the debtor's receiver.[2] The receiver can not question such a transfer as representing the debtor, since the debtor himself can not impeach his own completed act, however fraudulent as against creditors. Nor can the receiver authorize the forcible taking possession of the property as representing the judgment creditors, since the property, even though transferred to delay and hinder such creditors, does not for that reason belong to them, or to their representative, so as to give a right to its immediate and absolute control, before action brought to set aside the transfer.[3] So when the debtor is in possession of property, belonging to or claimed by a third person under a title apparently valid, and which is held by the debtor as his agent, it is improper by order of court to direct the delivery of such property to the receiver, since the courts will not thus summarily dispose of or determine the title to property claimed by third parties, but will leave the parties to the appropriate mode of recovering

[1] Kennedy *v.* Thorp, 51 N. Y., 174. And see as to the doctrine of estoppel in actions by a receiver, Richards *v.* Allen, 3 E. D. Smith, 399.

[2] Brown *v.* Gilmore, 16 How. Pr., 527.

[3] Brown *v.* Gilmore, 16 How. Pr., 527.

the property, in an action by the receiver against the person claiming title.[1] And when the court is fully authorized to appoint a receiver of the debtor's estate, who might bring an action to test the title to property in the hands of a third person, claiming title from the debtor, it is improper to determine such disputed question of title upon a summary application, the remedy by the appointment of a receiver being the appropriate course to pursue.[2]

§ 458. When the receiver of a judgment debtor brings an action to set aside an assignment made by the debtor for the benefit of his creditors, it is proper for the court to permit the assignees to continue in possession, and to dispose of the property and collect the debts, holding the proceeds subject to the order of the court, when no fraud is shown as against the assignees, and when they are perfectly solvent and able to respond to any liability on account of the property assigned. The assignees, under such circumstances, will be regarded in the light of special receivers, and bound to abide by such further order as the court may make in the premises.[3] And when the receiver institutes an action for the recovery of property assigned by the debtor, under a voluntary assignment for the benefit of his creditors, he is not entitled to an injunction and a receiver of the assigned property, if he fails to show that the assignment was made to delay, hinder or defraud the creditors.[4]

§ 459. To entitle the receiver to maintain an action to set aside an assignment of the debtor's property for the benefit of his creditors, it is not sufficient to allege in his pleadings merely that he was appointed receiver in the creditor's suit, but the judgment and other facts necessary to sustain the creditor's suit should be set forth. In other words, the receiver must state the equities of the parties whom he represents, in order to maintain such an action, since he is only clothed with the same rights of action which might

[1] Rodman *v.* Henry, 17 N. Y., 482.

[2] Teller *v.* Randall, 40 Barb., 242.

[3] Spring *v.* Strauss, 3 Bosw., 607.

[4] Bostwick *v.* Elton, 25 How. Pr., 362.

have been maintained by the creditors whose representative he is.[1] And in an action by the receiver to remove a cloud from the title of property of the debtor and to subject it to execution, the production of an order appointing the receiver, made by a court of competent jurisdiction and reciting the facts necessary to give the court jurisdiction, affords conclusive evidence of the regularity of the order and *prima facie* evidence of the facts necessary to confer jurisdiction.[2] And in an action brought by such a receiver, to set aside an alleged fraudulent assignment and conveyance of the debtor's property to a third person, the debtor himself is a proper party defendant.[3]

§ 460. It has been held that where a debtor assigns his property to one of his creditors, upon condition that he shall deduct his own demand out of the proceeds, and then apply the balance in payment of the other creditors, and the assignee sells and transfers the property to a third person upon the same condition and subject to the same trust, and such purchaser fulfills the duty in part, a receiver of the debtor's effects, appointed in behalf of a judgment creditor, can not maintain an action against the purchaser for a balance of the fund remaining in his hands. In such case, it being the plain duty of the purchaser to distribute the fund among the creditors, the receiver acquires no right of action for its recovery.[4]

§ 461. As between different judgment creditors of the same debtor, one of whom, by his superior diligence, obtains possession of or a charge upon the debtor's property, equity will not interfere in behalf of a more dilatory creditor to disturb such possession.[5] And this is equally true, even though the judgment of the creditor obtaining such priority is later in date than the others.[6] It is held, there-

[1] Coope *v.* Bowles, 42 Barb., 87; S. C., 28 How. Pr., 10.

[2] Wright *v.* Nostrand, 94 N. Y., 31.

[3] Palen *v.* Bushnell, 18 Ab. Pr., 301; Allison *v.* Weller, 3 Hun, 608.

[4] Smith *v.* Woodruff, 1 Hilt., 462.

[5] Bates *v.* Brothers, 2 Sm. & G., 509. See, also, Parks *v.* Sprinkle, 64 N. C., 637.

[6] Bates *v.* Brothers, 2 Sm. & G., 509.

fore, in a race of diligence between judgment creditors for the property of their debtor, that the one who first institutes a creditor's suit and procures a receiver therein takes priority, and is entitled to the property of the debtor not previously levied upon, as against a creditor who has not yet obtained a receiver.[1] But where judgment creditors claim a lien upon a fund in the hands of the receiver of their debtor, and petition the court for an order appropriating the fund in payment of their judgment, the court will not grant such order *in limine* and before the other creditors interested in the fund can be heard. It is, however, proper to restrict the receiver from paying out the fund, in such case, without notice to the creditors claiming the lien. And the creditors claiming such lien may be authorized to institute an action against the receiver to establish their rights.[2] So when, pending an attachment suit, a creditor's bill is filed against the defendants, under which receivers are appointed over their effects, plaintiffs in the attachment, after obtaining judgment, can not, by a summary rule against the receivers, compel payment in full of their demand out of funds of the receivership, before a full hearing as to the priorities of all parties in interest.[3]

§ 462. Under the English practice, receivers are sometimes appointed in aid of creditors who have instituted proceedings in bankruptcy against a debtor; and a receiver thus appointed, upon the application of any one creditor, is regarded as appointed equally for the benefit of all. Such a receiver, therefore, can not rightfully permit a payment to be made to the creditor on whose application he was appointed, in preference to the remaining creditors, and such a payment will be held fraudulent and void as against the trustee of the creditors in the proceedings in bankruptcy.[4]

[1] Parks *v.* Sprinkle, 64 N. C., 637. And see, as to the relative rights and liens of different judgment creditors who have instituted supplementary proceedings under the New York code against their debtor, in property which the debtor had assigned to a third party, Conger *v.* Sands, 19 How. Pr., 8.

[2] Hubbard *v.* Guild, 2 Duer, 685.

[3] Lowe *v.* Stephens, 66 Ga., 607.

[4] *Ex parte* Jay, L. R., 9 Ch. App., 133.

§ 463. It has been elsewhere shown, in discussing the subject of receivers of insolvent corporations appointed for winding up their affairs under the statutes of various states, that such receivers are frequently vested with the power of making assessments for and collecting unpaid balances due from delinquent shareholders upon their subscriptions to the capital stock of the corporation.[1] But this power or right of action is derived wholly from statute, and does not exist in the absence of statutory authority. And it is held in New York, that a receiver of a corporation appointed on a creditor's bill, and vested with only the ordinary powers of receivers in creditors' suits, can not, by virtue of his appointment, maintain a bill in equity against a shareholder to enforce payment of a balance due upon his subscription to the capital stock of the corporation.[2]

§ 464. In an action by the receiver of an insolvent debtor to recover upon notes due to the debtor's estate, the maker of such notes can not set off against the action a judgment which he has obtained against the receiver upon a note executed by the judgment debtor; since, to allow such set-off, would be to give the defendant a preference over other creditors. His judgment against the receiver is regarded only as a legal determination of the amount and validity of his claim, and not an adjudication giving it preference over others.[3]

[1] See § 324, *ante*.

[2] Mann *v.* Pentz, 3 N. Y., 415. And see, as to the functions and powers of a receiver of a moneyed corporation appointed in behalf of a judgment creditor under the laws of New York, Angell *v.* Silsbury, 19 How. Pr., 48.

[3] Clark *v.* Brockway, 3 Keyes, 13; S. C., 1 Ab. Ct. Ap. Dec., 351. Clark *v.* Brockway was an action by the receiver of the estate of one Sherman, to recover upon notes executed by defendant to the assignees of Sherman, and which had passed from the assignees to the receiver on the assignment being set aside as void against creditors. Defendant had obtained a judgment on a note of Sherman's held by him, and a further judgment against the receiver, directing the latter to pay such judgment out of the assets in his hands. The court below denied the right of set-off and gave judgment for the receiver for the amount of the notes, and the judgment was affirmed on appeal. Hunt, J., says, p. 14: "The defendant, in his suit against

§ 464 *a*. A receiver over an insolvent debtor, under the statutes of Rhode Island, is entitled, by virtue of his appointment, to letters patent owned by the debtor, and the court may order the debtor to make a conveyance to the receiver, if necessary to fully invest him with title thereto.[1] But, in the absence of such a conveyance, it is held, that a sale and assignment by a receiver of the interest of the judgment debtor in letters patent confers no title upon the purchaser, such an assignment not being a written instrument signed by the owner of the patent, as required by the act of congress, but a mere assignment by operation of law, and without the action of the patentee or owner.[2] But a receiver in proceedings supplementary to execution, in New York, succeeds to the title of the judgment debtor in a certificate of membership in the New York Cotton Exchange, and may maintain a suit to redeem such certificate from one to whom it has been pledged.[3]

§ 465. When a receiver of the effects and estate of a

the present plaintiff, as receiver, and others, recovered a judgment directing the receiver to pay the amount of the notes held by him, $345.48, with the costs, and he claims that judgment to be decisive of the present suit. In this, I think, he errs. His judgment is a legal determination of the validity of his claim, but it does not determine when it shall be paid, or what, if any, shall be its preference over other debts. By obtaining an offset against the notes in suit, the defendant would at once obtain payment of his claim to that amount, and this without regard to the amount of debts or assets applicable to the general settlement of Wm. Sherman's affairs. He might thus obtain a large proportion or the whole of his debt, while others, equally entitled, might be compelled to accept a much smaller proportion. This the law does not allow. Equality in the payment of debts by a receiver is the rule of law, unless, by diligence or for some special reason, a preference is declared of one creditor or of one class over creditors generally. No such circumstance exists in this case, and the judgment is to be regarded as determining simply the validity of the plaintiff's claim on the notes held by him. His debt is adjudged to be valid, but it must take its chances of payment with other valid debts in the general administration of the estate of Wm. Sherman."

[1] *In re* Keach, 14 R. I., 571.

[2] Gordon *v.* Anthony, 16 Blatchf., 234.

[3] Powell *v.* Waldron, 89 N. Y., 328.

judgment debtor, appointed in different creditors' suits, becomes vested with the title to all the debtor's property immediately upon the filing and recording of his order of appointment, he may maintain an action for the proceeds of a note due to the estate in the hands of third parties, notwithstanding they have, subsequent to the appointment, procured an *ex parte* order of court directing the note to be applied upon a judgment which they hold against the debtor; since the title to the note having vested in the receiver, it is not in the power of the court to divest his title on an application to which he is not a party.[1]

§ 466. A receiver of a judgment debtor can not, by mere motion or application to the court, reach an interest in property of an inalienable nature, which is vested in the debtor as *cestui que trust*, or devisee under a will. And when a testator has devised his property to executors, in trust to convert it into money and to divide it in certain shares, one of which is to go to the debtor, the court will not grant the receiver an order for the sale of such interest, upon a mere application or petition for that purpose. If the creditors are to derive any benefit from the provisions of the will, in such case, it must be by a proceeding to which the executor is a party.[2]

§ 467. A receiver appointed in a judgment creditor's suit would seem to have the same rights of action against the debtor himself, for the conversion of his property, as against strangers, and he may, therefore, maintain an action for such conversion by the debtor. But he acquires only such title as the debtor had at the time of appointment, and if the debtor's title was a mere equity of redemption in mortgaged chattels, and the receiver neglects to redeem the property by paying off the mortgage, until the right of the mortgagee becomes absolute, neither the debtor, nor the plaintiff as his receiver, has any interest in the property which can be the subject of a conversion, or sustain an action by the

[1] Rogers *v.* Corning, 44 Barb., 229. [2] Scott *v.* Nevius, 6 Duer, 672.

receiver.[1] And the receiver is not, by virtue of his appointment, invested with any title to property which may be afterward acquired by the debtor; he can not, therefore, maintain an action for the recovery of money received by the debtor subsequent to the appointment.[2]

§ 468. In New York, it is held that a receiver in a creditor's suit may maintain an action for the recovery of usurious payments made by the debtor to a third person; since the receiver is the representative, not merely of the debtor, but of the creditors, and his title is, therefore, sufficient to maintain such an action. And the judgment debtor is not a necessary party to such an action.[3]

§ 469. A receiver of a judgment debtor can not maintain an action to recover back the value of property which has been sold at a sheriff's sale under executions against the debtor, when the creditor, in whose behalf the receiver was appointed, was present by his attorney and requested and acquiesced in the sale by the sheriff, but afterward procured the appointment of a receiver, on failing to obtain the proceeds of such sale, which were diverted to the payment of other executions in the hands of the sheriff.[4]

§ 470. When a debtor voluntarily appears in court, and consents to a receiver being appointed over his estate and effects for the benefit of his creditors, in an action instituted by such receiver to recover upon a demand due to or for property owned by the debtor, the defendant can not object to the irregularity in the receiver's appointment, since, the party against whom the receiver was appointed having consented to the proceedings and waived all irregularities therein, it does not lie in the mouth of his debtor or of third persons to question the regularity of such proceedings.[5]

[1] Gardner *v.* Smith, 29 Barb., 68.

[2] Graff *v.* Bonnett, 25 How. Pr., 470.

[3] Palen *v.* Bushnell, 18 Ab. Pr., 301.

[4] Richards *v.* Allen, 3 E. D. Smith, 399.

[5] Tyler *v.* Willis, 33 Barb., 327; S. C., *sub nom.* Tyler *v.* Whitney, 12 Ab. Pr., 465; Powell *v.* Waldron, 89 N. Y., 328; Green *v.* Bookhart, 19 S. C., 466.

Nor can the validity of the receiver's appointment be assailed, collaterally, as in a suit brought by him against third parties, if sufficient jurisdictional facts were shown in the original proceeding for his appointment to warrant the court in the exercise of its jurisdiction; since the judgment debtor being concluded so long as the order is unreversed, third persons are also concluded.[1] When a receiver over a judgment debtor receives rents from sub-tenants of the debtor, for the rental of premises of which the debtor held a lease, such funds are not subject to distribution among the creditors generally, but are reserved for the landlord of the premises, whose equity is superior to that of all other creditors. And in such a case, the receiver will be directed to pay the money to the landlord, or to his representative, upon petition showing the facts.[2]

§ 471. It is held, that a receiver appointed on a creditor's bill in a circuit court of the United States, having no right or authority except such as is conferred upon him by the order of his appointment, can not maintain an action in a federal court in another district to compel the surrender of certain securities of the debtor held by defendant, to be applied in satisfaction of the judgment in aid of which the receiver was appointed. Such a receiver, it is held, has no extraterritorial jurisdiction or rights of action, and the federal court by which he was appointed is treated, for the purposes of such a case, as a court of local and limited jurisdiction. Nor is his right of action, under such circumstances, enlarged by the fact that, under the statutes of the state in which he was appointed, receivers on creditors' bills are vested with full title, and have full authority to maintain suits; since the laws of the state can not enlarge or alter the effect of the order of the federal court, nor enlarge the jurisdiction of that court.[3]

[1] Whittlesey *v.* Frantz, 74 N. Y., 456.

[2] Riggs *v.* Whitney, 15 Ab. Pr., 388.

[3] Brigham *v.* Luddington, 12 Blatchf., 237. This was a bill filed in the circuit court of the United States, for the southern district of

§ 471 *a*. When a receiver is appointed in a creditor's suit instituted to reach the property and equitable interests of judgment debtors, and to subject them to the payment of the judgment, and the debtors assign their property to the receiver, the receivership does not terminate by the death of the receiver, or by the death of the judgment debtors.

New York, by a receiver appointed on a judgment creditor's bill in the circuit court of the United States, for the eastern district of Wisconsin, seeking a recovery of certain securities of the judgment debtor, and to apply them in satisfaction of the judgment. Mr. Justice Woodruff says, p. 242: "I notice, without enlarging upon the subject, a further objection, viz., that the complainant, having no right or authority, except such as was conferred by an order of the circuit court of the United States, for the eastern district of Wisconsin, can not maintain this suit in this district. The opinion of the supreme court in Booth *v.* Clark, 17 Howard, 322, seems to me fully to sustain this objection. That was an action in the circuit court for the District of Columbia, by a receiver appointed under a creditor's bill filed in a court of equity of the state of New York. He was held not entitled to sue. The suggestion of counsel, that the circuit court for this district and the circuit court for the eastern district of Wisconsin, derive their authority from the same government and the same federal laws, does not meet the difficulty. The decision did not proceed upon the sole ground that the jurisdiction of New York was foreign to that of the federal courts; but on the ground that such a receiver could not sue in another territorial jurisdiction. The circuit court for this district and the circuit court for the eastern district of Wisconsin each exercises a local and limited jurisdiction, and I am not able to withdraw this case from the operation of the decision of the supreme court above cited. (See, on this subject, Hope Mutual Life Ins. Co. *v.* Taylor, 2 Robertson, 278.) To the suggestion of counsel, that, by the statutes of Wisconsin, receivers appointed on creditors' bills are vested with full title, and have full authority, to maintain suits, which this court ought to recognize, it must suffice to say: (1) This receiver was appointed under and by virtue of the general power of courts of equity, and with such effect only as is due to the order of the court making the appointment. He was not appointed under or by virtue of any statute. (2) The statutes of the state of Wisconsin can not enlarge or alter the effect of an order or decree of the circuit court of the United States, nor enlarge or modify the jurisdiction of that court or its efficiency. Payne *v.* Hook, 7 Wal., 425. These views render it wholly unnecessary to consider the merits of this suit or the various matters ably discussed on the hearing. I am constrained to conclude that the bill should be dismissed."

And while the creditor's suit abates by the death of the judgment debtors, the title to their property is regarded as vested in the court itself. It is, therefore, competent for the court to appoint a new receiver, who may institute actions to recover the estate of the debtors.[1]

[1] Nicoll *v.* Boyd, 90 N. Y., 516.

CHAPTER XIII.

OF RECEIVERS OVER PARTNERSHIPS.

I. Principles on Which the Relief is Granted.

§ 472. The jurisdiction well established; doctrine of Lord Eldon; probability of decree for dissolution.

473. Courts proceed with extreme caution; beneficial nature of the relief.

474. Receiver granted on same ground as injunction; actual abuse necessary; dissolution; quarrel between partners.

475. Court does not determine ultimate rights of the parties.

476. There must be an actual partnership *inter se;* employee, though nominal partner, can not have receiver.

477. Right to participate in profits the test; burden of proof on plaintiff.

478. Defendant permitted to give security to account to plaintiff, in lieu of receiver.

479. Denial of partnership by defendant not alone sufficient to prevent receiver.

480. Not the province of the court to superintend the business.

481. Receiver may manage business *pendente lite;* running steamboat; horses and carriages; political paper.

482. Courts will interfere only in clear cases; and where there is mismanagement.

483. Breach of duty must be shown; irreconcilable disagreement; fraud; probability of loss.

484. Want of confidence as a ground for receiver.

485. Failure to co-operate in management of business no ground for receiver; unprofitable business no ground for relief.

486. Appointment not a matter of course; confidence between partners.

§ 472. The appointment of receivers in actions between partners for an accounting and a settlement of their partnership affairs, to take charge of the assets, collect the debts and wind up the business of the firm, is a legitimate exercise of the jurisdiction of courts of equity, and one which is clearly sustained by the authorities.[1] And the power of thus appointing a receiver in an action for the dissolution of a partnership and the settlement of the firm business, is regarded as essential to the object sought by such a suit, and falls within that class of incidental powers which the courts

[1] See Saylor *v.* Mockbie, 9 Iowa, 209; Jordan *v.* Miller, 75 Va., 442.

having jurisdiction over such cases have full authority to exercise.[1] The doctrine of the English Court of Chancery, as laid down by Lord Eldon, was, that the court would not take a partnership business into its own hands by the appointment of a receiver, unless the suit was so framed that a decree could be made at the hearing, either that the business be carried on according to the terms of some instrument, which by agreement between the parties was to regulate the manner of conducting the business, or that it be wholly ended and the partnership dissolved.[2] And while the tendency of the later decisions, especially in this country, has been averse to the continuance and management of a partnership business by a receiver, the other element in the rule as laid down by Lord Eldon, viz., the probability of a decree for a dissolution, is still recognized as a controlling element in determining whether a receiver shall be appointed.

§ 473. The determination of an application for a receiver, upon a bill seeking the dissolution of a partnership, is justly regarded as a matter of extreme delicacy, and one which requires the most careful consideration upon the part of the court; since, if the application is granted, its effect is to terminate the partnership contrary to the wishes of the defendant partner, while, if refused, it leaves defendant to continue the business at the risk of great loss and prejudice to plaintiff's rights.[3] But, while the courts proceed with

[1] Gridley *v.* Conner, 2 La. An., 87.

[2] Const *v.* Harris, Turn. & R., 517.

[3] New *v.* Wright, 44 Miss., 202; Madgwick *v.* Wimble, 6 Beav., 495. These considerations are well expressed by Lord Langdale, Master of the Rolls, in the latter case, p. 500, as follows: "It must be admitted that when an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership which one of the parties claims the right to have continued; and on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business, at the risk, and probably at the great loss and prejudice, of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the court is under the necessity

extreme caution in exercising their power of appointing receivers in this class of cases, the jurisdiction is regarded as an extremely beneficial one, since cases frequently arise of disputes in the settlement of partnership affairs, where the interests of both parties can only be properly secured by the intervention of equity through the appointment of a receiver.[1]

§ 474. It may be said, generally, that substantially the same conditions are requisite to warrant the extraordinary aid of equity by appointing a receiver in partnership cases, as are necessary to induce the court to interfere by injunction. Some actual abuse of the partnership property, or of the rights of a copartner, must appear, and not a mere temptation to such abuse, and the grounds relied upon should usually be such as to authorize a decree for a dissolution of the firm. When the dissolution has already taken place, or when it is apparent that it will be decreed upon the ground of some breach of duty by one of the partners, a receiver may be appointed, but the court will not interfere merely because of a quarrel between the partners, since this does not, of itself, constitute sufficient ground for a dissolution.[2]

of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties, and it has accordingly interfered in many such cases."

[1] See Speights *v.* Peters, 9 Gill, 472. Frick, J., very forcibly observes, with reference to the power of appointing receivers, as follows, p. 476: "It is a high power, never exercised where it is likely to produce irreparable injustice or injury to private rights, or where there exists any other safe or expedient remedy. While in a variety of instances, especially in partnership transactions, where the parties, after dissolution of their connections, can not agree upon the adjustment, and the property or funds in dispute are in the hands of one partner alone, each having an equal right to the control of the property, cases must necessarily arise where the interest of both can only be properly secured by the intervention and appointment of a receiver."

[2] Henn *v.* Walsh, 2 Edw. Ch., 129. The principles governing the courts in the appointment of receivers in partnership cases are well stated by McCoun, Vice-Chancellor, in this case, as follows, p. 130: "A partnership agreement, like any other, is binding upon the

§ 475. Upon applications for receivers of partnership assets, in actions for a dissolution and a settlement of the affairs of the firm, the court does not determine the ultimate

parties, and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other without a sufficient cause. Mere dissatisfaction by one partner will not justify him in filing a bill for a dissolution, where, by their express agreement, it is to continue for a definite term; and this court will not interfere to dissolve the contract upon such ground. Here, there was a five-years partnership, with the privilege of dissolving it at the end of two years. The complainant has become dissatisfied; and he makes various charges in his bill, showing *prima facie* cause enough for a dissolution before the stipulated time. But his allegations are positively and fully denied in the answer. As the matter now stands, the complainant's case fails, and he would not be entitled, on the hearing, to a decree for a dissolution — consequently, not to an injunction or receiver in the meantime. If there be any breach of covenants by one partner which, in its consequences, would be so important as to authorize the party complaining to call for a dissolution before the copartnership could be dissolved by the efflux of time, the complainant may then have an injunction. There must be some actual abuse of the partnership property or of the rights of a copartner, and not a mere temptation to such abuse, which will induce this court to interfere. The same rules apply in respect to the appointment of a receiver. It must appear to be such a case as would authorize a decree for dissolution. In thus interposing, the court generally looks to the winding up of the affairs, and not to the continuation of a trade under its authority. Where a dissolution has already taken place, or it is apparent that it will be decreed on the ground of some breach of duty or contract by one of the partners, there a receiver will be appointed. But if partners quarrel, a receiver will not be appointed merely on such an account, because it may not, of itself, be a sufficient ground for severing the connection between them. In the present case, the complainant produces affidavits to show a breach of the articles of the partnership by the defendant's withdrawing more than the stipulated twenty-five dollars per month. The affidavits are not positive on the subject. They speak merely from what appears by entries in the books, coupled with what is believed; while on the other hand, the denials of the defendant are positive. I can not at present, in the face of all this, interfere. It may be an unfortunate connection which the complainant has formed. Still, he entered into it advisedly; and he must endure it until the contract allows of a withdrawal, unless he can overthrow the denials of the defendant by superior evidence. The injunction must be dissolved, and the motion for a receiver denied."

rights of the parties, and will refuse to pass upon those rights upon such preliminary applications. The duty of the court, in such cases, is merely to protect the property *pendente lite*, for the benefit of whoever may ultimately be determined to be entitled thereto, when the court shall have before it all the evidence necessary to a full and complete determination of the questions involved. And the court does not, on the preliminary application, pretend or assume to say which of the partners is entitled to the firm assets.[1] But when the case is ready for final hearing upon the pleadings and proofs, it is error to appoint a receiver over a partnership without first adjudicating the merits upon which the right to such relief depends, and without any showing of urgency or of an immediate necessity for the appointment.[2]

§ 476. It is important to observe, that, as regards the parties themselves, a court of equity will not lend its extraordinary aid by appointing a receiver unless an actual partnership *inter se* be shown to have existed; and it is, therefore, in all cases, essential to the exercise of the jurisdiction, that there should actually be an existing partnership, either admitted by defendant or established by satisfactory proof, since otherwise the individual property of a defendant might be taken from him by a receiver, and in the end it might appear that plaintiff had no right.[3] Where, therefore, the existence of a partnership is directly in dispute, and is denied by defendant, in an action for an accounting, the court will not appoint a receiver *in limine*, especially where there is no allegation of defendant's insolvency, or of his inability to respond in the event of a final recovery against him.[4] And where the partnership is only a nominal one, the parties using a firm name, but under an agreement that one shall be employed as a clerk or employee of the other, re-

[1] Blakeney *v.* Dufaur, 15 Beav., 40.

[2] Morey *v.* Grant, 48 Mich., 326.

[3] Goulding *v.* Bain, 4 Sandf., 716; Kerr *v.* Potter, 6 Gill, 404; Nutting *v.* Colt, 3 Halst. Ch., 539. See, also, Hobart *v.* Ballard, 31 Iowa, 521; Popper *v.* Scheider, 7 Ab. Pr., N. S., 56.

[4] Goulding *v.* Bain, 4 Sandf., 716.

ceiving as compensation a share of the profits, either with or without additional salary, the agreement expressly stating that they are not partners, and that no partnership relation was intended to be formed, the person thus employed can not maintain a bill against the other for an injunction and a receiver, since he has no such lien upon the assets as to warrant the interposition of a court of equity in his behalf.[1] And this is true, even though the parties by their conduct have become liable as partners to third persons, the rights of third persons or of creditors not being involved in the litigation.[2]

§ 477. In the application of the general rule which limits the relief to cases of existing partnership between the parties, it must satisfactorily appear that the partnership was actually completed so far as to entitle the parties to a participation in profits; since the right to participate in the profits, and the danger which one partner might sustain by being excluded therefrom, pending an action for a dissolution, constitute the principal reason for the appointment of receivers in this class of actions. And the burden of showing the existence of a partnership at the time of the application for a receiver rests upon the plaintiff. Where, therefore, the consummation of the relation to the extent of a right to participate in the profits is not shown, there being only a contract which might ripen into a partnership upon payment of certain money, being in the nature of an executory agreement to form a partnership, a receiver should not be allowed.[3]

§ 478. Where plaintiff, in an action for the dissolution of a partnership, has obtained an injunction and a receiver, but the partnership relation is denied by defendants, and it is apparent that plaintiff's interest in the firm, if any, is very small, and that by continuing the receiver the business will be greatly imperiled and perhaps ruined, it is proper for the court to modify the order for the injunction and receiver

[1] Kerr *v.* Potter, 6 Gill, 404; Nutting *v.* Colt, 3 Halst. Ch., 539.

[2] Kerr *v.* Potter, 6 Gill, 404.

[3] Hobart *v.* Ballard, 31 Iowa, 521.

by permitting defendants, in lieu thereof, to give security for the payment to plaintiff of any sum which may be found due him upon a final settlement. In such a case, the court, proceeding upon equitable principles, will mold and adapt its remedy so as to attain substantial justice, without compromising the rights of any of the parties.[1]

§ 479. While it is true, as has thus been shown, that, in cases of doubt as to the existence of a partnership, courts of equity will not interfere by a receiver, yet if, from the affidavits presented upon the application, it satisfactorily appears that there is a partnership and that defendant is in possession of most of the assets, denying the other partner access thereto, the court may properly grant the aid of a receiver, although defendant by affidavits denies the existence of a partnership. In other words, the mere denial by the defendant partner of the existence of a partnership is

[1] Popper *v.* Scheider, 7 Ab. Pr., N. S., 56. McCunn, J., says, p. 58: ". . This action is in the nature of a suit in equity, in which the relief demanded is the dissolution of an alleged copartnership, and an adjustment of the partnership accounts, and in which provisional relief is sought by an injunction and the appointment of a receiver. I allowed an interlocutory order for an injunction and the appointment of a receiver. The motion now is to modify the order of injunction and appointing a receiver; and, instead, to permit the defendants to file security to pay the plaintiff any sum that may be found due him on a final settlement of the partnership accounts. In view of the facts that a partnership between the plaintiff and defendants is positively denied; that a very small proportion of the partnership capital was contributed by the plaintiff, if, indeed, any were contributed by him in the character of partner; that by the allowance of an injunction and the appointment of a receiver the partnership business, which is very large and flourishing, will be arrested, and perhaps ruined; and that by the modification proposed, the plaintiff will be abundantly secured in all his rights, absolute or contingent, I can not doubt but the equity of the case requires a rescission of the order of injunction and receivership, and the substitution of an order to the effect suggested. It is thus that a court of equity molds and adapts the remedial relief it accords, so as to reach the ends of substantial justice, without compromising the rights or interest of any party to the litigation. A provisional remedy is only auxiliary to ultimate relief, and should never usurp or anticipate the office and effects of a trial on the merits."

not sufficient to prevent the appointment, when the court is satisfied from the evidence in support of the application that the partnership relation exists.[1]

§ 480. It is important to bear in mind, in considering the subject of receivers in partnership cases, that it is not the province of a court of equity to conduct the business of a copartnership, and while a receiver may be directed to continue the business a sufficient length of time to enable the court to determine the rights of the parties litigant, it is not the province of the court to become the superintendent and manager of the private business of parties.[2] Indeed, this necessarily follows from the very object and purpose con-

[1] Hottenstein v. Conrad, 9 Kan., 435. Brewer, J., says, p. 440: "It would be opening the door to a great deal of wrong to hold that by simply denying the existence of a partnership, a party in possession of large amounts of partnership property could hold that possession until, after the delay of a suit, the verdict of a jury had established the partnership. It would often result in real victory to the wrong-doer. A court having the right to hear testimony as to a fact, upon a motion, has a right to find the existence of that fact. Wherever an application for a receiver in a partnership case is made, the court has to hear some testimony as to the existence of the partnership. Ordinarily, there is on this point no counter testimony; yet the court finds on the testimony presented on the motion that there was a partnership. Without such finding, it could not appoint a receiver. Having power to make such a finding, that power is not taken away by the introduction of counter testimony. It must still find as to the fact. If there be much contradiction in the testimony, it may require proof of additional facts, such as the insolvency of the defendant, before making any appointment. But still, its power to examine the testimony, and determine as to the fact, remains. Whatever a court may examine into on motion, it may also determine. Its determination, for the purposes of the motion, establishes the fact."

[2] Allen v. Hawley, 6 Fla., 164; Wolbert v. Harris, 3 Halst. Ch., 605. See, also, Marten v. Van Schaick, 4 Paige, 479; Jackson v. De Forest, 14 How. Pr., 81. In Allen v. Hawley, 6 Fla., 164, Mr. Justice Dupont observes: "As it is not the province of the court to create a copartnership, so it is equally foreign from its functions to conduct its business. It never could have been contemplated that a court of chancery should become the superintendent of the private affairs of individuals. Its legitimate province is to adjust the rights and settle the disagreements of parties growing out of such transactions."

templated by the court in appointing a receiver upon a bill for the dissolution of a partnership, such purpose being the preservation of the firm property until the cause can be determined, the court, through its officer the receiver, having charge of the firm assets, not in behalf of either party, but for the common benefit of all.[1]

§ 481. While, as is thus seen, courts of equity will not sanction the permanent or continued management of a partnership business in the hands of a receiver, he may, in a proper case, be allowed to continue the management of the business pending legal proceedings for a dissolution, in order that the good-will may be preserved to the ultimate purchaser, and its full value be realized by the partners at a final sale, and to prevent great loss to the parties.[2] Thus, where two persons are interested as partners in a steamboat, upon a bill for a dissolution and an accounting it is proper to appoint a receiver, and to direct him to operate the boat during the continuance of the litigation, and until the rights of the parties can be finally determined.[3] So where the partnership property is of such a nature that it is liable to injury by remaining idle, and it is for the obvious benefit of all parties that it should be employed until a sale can be effected, as in the case of horses and carriages, where profits might accrue from their hire and the expense of their keeping is a serious charge upon the receiver, the court may permit him to let and hire the property for the benefit of the partnership fund, until a favorable sale can be effected.[4] But the court will not assume the responsibility of continuing the publication of a political paper, which constitutes the partnership assets, any longer than is absolutely necessary for the preservation of the property; and until a sale can be effected by the receiver, the partners owning the

[1] Wolbert *v.* Harris, 3 Halst. Ch., 605.

[2] Allen *v.* Hawley, 6 Fla., 164; Marten *v.* Van Schaick, 4 Paige, 479; Jackson *v.* De Forest, 14 How. Pr., 81; Heatherton *v.* Hastings, 5 Hun, 459.

[3] Allen *v.* Hawley, 6 Fla., 164.

[4] Jackson *v.* De Forest, 14 How. Pr., 81.

paper may be allowed to continue its editorial management, the publication being managed under the receiver's direction.[1]

§ 482. Courts of equity are averse to the dissolution of partnerships and the appointing of receivers, when it is apparent that this course will result disastrously to the interests of the parties, and when the defendant partner protests against a dissolution. And it may be said generally, that the courts will not lend their aid by receivers, in this class of cases, except in cases falling clearly within the principles laid down by the authorities.[2] And while the general rule is well established, that if upon the dissolution of a partnership the partners can not agree upon the disposition to be made of the firm assets, and one of the partners prevents or seeks to exclude the other from participation in the management of the firm effects, a receiver will be appointed, yet it must clearly and satisfactorily appear that there is a conflict of interest, and that one partner is seeking to deprive the other of his right to manage the business. Where, therefore, it does not appear that the defendant partner, against whom a receiver is sought, has offered any opposition to plaintiff's participation in settling the firm business, and the answer denies that defendant is proceeding against the rights or contrary to the interests of his copartner, and denies that he has made any demand upon plaintiff for any of the firm assets, a receiver will be refused. The court will not, under such circumstances, in the absence of proof of mismanagement on the part of defendant, permit him to be be deprived of all control over the settlement of the business.[3]

§ 483. The general rule is, that to warrant a receiver in partnership cases, there must be some breach of duty on the part of one of the partners, or a violation of the articles of copartnership.[4] And whenever, by reason of dis-

[1] Marten *v.* Van Schaick, 4 Paige, 479.

[2] See Page *v.* Vankirk, 1 Brews., 290.

[3] Terrell *v.* Goddard, 18 Ga., 664.

[4] New *v.* Wright, 44 Miss., 202.

sensions or disagreements between partners, the intervention of a court of equity becomes necessary to effect a settlement and winding up of their affairs, a receiver will be allowed upon a bill by one partner showing a breach of duty or a violation of the copartnership agreement by the other.[1] Thus, willful acts of fraud by the defendant, such as the misappropriation of firm funds, making false and improper entries upon the firm books, depriving complainant of access to the books, and concealing from him the true condition of the business, afford sufficient ground for appointing a receiver.[2] So when the pleadings disclose a serious and apparently irreconcilable disagreement between the partners, both as to the control and disposition of their effects and as to their respective demands against each other, the granting an injunction and a receiver is regarded as a provident exercise of the powers of a court of equity, sanctioned alike by authority and by the exigencies of the case.[3] It should, however, clearly appear that on account of the dissensions and disagreements complained of, serious injury will result to the parties unless a receiver is appointed, and such dissensions, without fault of defendant, will not justify the summary interposition of a receiver, unless it is clearly shown that the parties will suffer loss by continuing in possession of the property.[4]

§ 484. The fact that a partner's conduct has been such as to destroy the mutual confidence which ought to subsist be-

[1] Allen *v.* Hawley, 6 Fla., 164. Mr. Justice Dupont observes, p. 164: "From the examination which we have made of the authorities on this subject, we think the law may be considered as settled, that whenever the intervention of a court of equity becomes necessary, in consequence of dissensions or disagreements between the partners, to effect a settlement and closing of the partnership concerns, upon bill filed by any of the partners, showing either a breach of duty on the part of the other partners, or a violation of the agreement of partnership, a receiver will be appointed as a matter of course."

[2] Barnes *v.* Jones, 91 Ind., 161; Shannon *v.* Wright, 60 Md., 520.

[3] Whitman *v.* Robinson, 21 Md., 30.

[4] Loomis *v.* McKenzie, 31 Iowa, 425.

tween partners, is an important element influencing the court in granting relief by an injunction and a receiver.[1] And when one of two partners has exclusive control of the firm business, and so mismanages it that the firm speedily becomes insolvent, and all friendship and confidence between the partners are destroyed, the appointment of a receiver may be regarded as the only practicable method of speedily and peaceably winding up the affairs of the firm. The relief will be granted, in such a case, even though the plaintiff in the bill may have acted in an unwarranted and illegal manner, in himself attempting to exclude defendant from possession and control of the assets after filing his bill.[2] So when it is apparent from the bill and answer that neither partner has confidence in the other, and it is admitted by both that the firm is in a condition of insolvency, and each partner charges the other with intent to waste the joint property and to give an undue preference to certain creditors, it is peculiarly fitting and proper that a receiver should be appointed, as a means of winding up the firm business for the benefit of all concerned. Under such circumstances, the relief is granted primarily for the benefit of the firm creditors, that they may come in *pari passu* and share in the proceeds according as their respective priorities may be shown.[3]

§ 485. It is to be observed, however, that the mere want of co-operation by one partner in managing the business, thus leading the other to act upon his own responsibility, is not sufficient ground for the interference of equity by a receiver, when the defendant has not interfered with the management of the business by the plaintiff. And when one member of the firm occupies the relation of managing

[1] Smith *v.* Jeyes, 4 Beav., 503; Todd *v.* Rich, 2 Tenn. Ch., 107. See, also, Boyce *v.* Burchard, 21 Ga., 74; Williamson *v.* Wilson, 1 Bland, 418; Sutro *v.* Wagner, 8 C. E. Green, 388; White *v.* Colfax, 33 N. Y. Supr. Ct. R., 297.

[2] Boyce *v.* Burchard, 21 Ga., 74.

[3] Williamson *v.* Wilson, 1 Bland, 418. And see this case for an extended discussion of the principles governing courts of equity in granting receivers in partnership cases.

partner, having practically the sole management and control of the business, the mere fact that the other refuses to co-operate with him affords no sufficient ground for a receiver.[1] Nor does the fact that the partnership business has been unprofitable, or that it should be discontinued and the firm dissolved, warrant a court in taking the property out of defendant's hands, to be administered by a receiver.[2]

§ 486. The appointment of a receiver, upon a bill for an account of partnership affairs, is not a matter of course, since the granting of such applications as of course would frequently work great hardship and injustice. And when no disqualification is shown on the part of the defendant partner, the bill alleging no facts showing a necessity for a receiver, and merely alleging in general terms that plaintiff is on principles of equity entitled to the interposition of the court and the aid of a receiver, the court will refuse to interfere, the confidence reposed by one partner in another being a sufficient objection to the appointment of a receiver under such circumstances.[3]

§ 487. Where the conduct of the defendant partner has been such as to satisfy the court that he has deliberately resolved to break up and ruin the firm business, and the personal relations between the partners are such that they can never carry on the business advantageously, a fit case is presented for an injunction and a receiver.[4]

§ 488. Although there may be some dispute as to whether property in possession of the defendant partner, in an action for an account between partners, is really firm property, yet when it appears that it was received in part payment for a sale of firm property, and plaintiff shows that defendant is insolvent, and that he has acted in bad faith and has disposed of part of the property with intent to defraud creditors, sufficient cause is shown for an injunction and a

[1] Roberts *v.* Eberhardt, Kay, 148.

[2] Moies *v.* O'Neill, 8 C. E. Green, 207; Shoemaker *v.* Smith, 74 Ind., 71.

[3] Opinion of Gould, J., in Tomlinson *v.* Ward, 2 Conn., 396.

[4] Sutro *v.* Wagner, 8 C. E. Green, 388.

receiver, leaving defendant to show if he can, in the further stages of the cause, that the property in question was his individual property.[1]

§ 489. Where, upon the dissolution of a partnership, the members enter into an agreement fixing the terms of dissolution, and the retiring partner transfers the entire partnership property to the remaining partners, retaining only an equity to compel them to pay the firm liabilities, the courts will be exceedingly jealous in guarding the retiring partner's rights, and in enforcing performance of their agreement by the other partners. And if they violate and depart from the terms of such agreement in important particulars, and deny the retiring partner's right to have access to the books, to which he is entitled under the terms of the dissolution, sufficient cause is shown for a receiver to wind up the partnership affairs. And the fact that such an embittered state of feeling exists between partners, with reference to the winding up of their affairs, as to render it manifest that the right of supervision by one partner can not be exercised without great unpleasantness, is an additional ground for granting relief by a receiver.[2] But when the partners, upon a dissolution of the firm, enter into an agreement as to the method of collecting and disposing of their outstanding accounts and of closing up the firm business, a receiver should not be appointed when defendants are responsible, and when no danger is shown as likely to result from awaiting the final disposition of the case upon its merits.[3]

§ 490. As between the partners themselves, a receiver is appointed only for the protection of the party complaining against the adverse possession of the other partner. There is, therefore, no ground for a receiver upon the application of a partner who is himself in possession, since he is fully authorized to sell the firm assets, subject to his liability to

[1] Saylor *v.* Mockbie, 9 Iowa, 209.

[2] White *v.* Colfax, 33 N. Y. Supr. Ct. R., 297.

[3] Simon *v.* Schloss, 48 Mich., 233.

account to the other partner for his share. And if the defendant partner does not object to the control of the property by plaintiff, the latter, being in possession, will not be allowed a receiver.[1]

§ 491. Upon application for the extraordinary aid of equity by a receiver in cases of partnership, the relief will usually be denied when the equities of plaintiff's case are fully met and negatived by defendant's answer.[2] Thus, in an action for an account of the firm affairs and for a receiver of its assets, when the defendant partner denies by his answer the principal allegations of the bill, and denies that he has excluded plaintiff from participating in the business, or from having access to the books, and also denies that he has refused to account with the plaintiff concerning the firm business, a receiver will not be allowed.[3] So when the allegations of the bill are so general in their nature that an indictment for perjury could not be founded upon them if false, and the equities of plaintiff's case are fully denied by the answer, defendant denying that he has been guilty of any waste or improper expenditure or misappropriation of the partnership fund as charged in the bill, although plaintiff may be entitled to an accounting, no sufficient ground is presented to justify withdrawing the property from the hands of a defendant partner who is fully acquainted with the business, and putting it into the hands of a receiver.[4] And if the equities of the bill are all successfully met and contradicted by the answer, it is proper for the court to dissolve a preliminary injunction granted upon filing the bill, and to refuse the appointment of a receiver.[5]

§ 492. As between partners themselves, a receiver will not be appointed to take possession of property which the

[1] Smith *v.* Lowe, 1 Edw. Ch., 33.

[2] Parkhurst *v.* Muir, 3 Halst. Ch., 307; Williamson *v.* Monroe, 3 Cal., 383; Coddrington *v.* Tappan, 26 N. J. Eq., 141. See, also, Rhodes *v.* Lee, 32 Ga., 470.

[3] Parkhurst *v.* Muir, 3 Halst. Ch., 307.

[4] Williamson *v.* Monroe, 3 Cal., 383.

[5] Rhodes *v.* Lee, 32 Ga., 470.

plaintiff partner claims to belong to himself, as his individual property, transferred to him by the firm, and when it is not alleged that his right as individual owner of the property is questioned, or his possession disturbed.[1]

§ 493. Where, upon the dissolution of a partnership, the outgoing partner assigns his entire interest in the firm assets to the remaining partner, upon condition of the latter assuming all the debts of the firm, and agreeing to save the retiring partner harmless on account thereof, the relation thus established between the parties is analogous to that of principal and surety, the continuing partner having the clear legal title to the property, and there being no joint ownership. And while a receiver is not ordinarily allowed as against a clear legal title, when there is no lien or acknowledged trust, yet upon a bill by the surety or outgoing partner, showing that the continuing partner is fraudulently acting in disregard of his covenants, and sending his money beyond the state, and that plaintiff is being sued for the firm debts, a receiver may be appointed to take charge of such an amount of the firm assets as will suffice to discharge the joint indebtedness and relieve the surety.[2]

§ 494. When, upon the dissolution of a partnership, one partner assumes payment of all the firm indebtedness, and a creditor's bill is afterward filed upon a judgment against the firm, on which a receiver is sought, the application for a receiver should not be confined merely to the individual property of the partner as to whom the firm indebtedness has been assumed by his copartner, but should extend to and cover the partnership effects, as well as the separate property of the defendant who is the real debtor.[3]

§ 495. Upon a bill for an accounting between partners, and for a settlement of their affairs after a dissolution, the appointment of a receiver has the effect of preventing one partner from giving a preference to any creditor by a warrant of attorney to confess judgment for a firm indebted-

[1] Buchanan *v.* Comstock, 57 Barb., 579.

[2] West *v.* Chasten, 12 Fla., 315.

[3] Henry *v.* Henry, 10 Paige, 314.

ness. And a creditor thus obtaining judgment acquires no such lien as entitles him to satisfaction of his judgment out of the fund in the receiver's hands, in preference to the other partnership creditors.[1] But the jurisdiction of equity over the affairs of insolvent partnerships, by the appointment of receivers, will not be exercised in such manner as to interfere with the rights of creditors, which have ripened into liens upon the firm property by the use of diligence, before the receiver's appointment. And the levy of an execution by a judgment creditor of the firm, upon partnership property, before the order appointing a receiver, will not be overreached by such order, and the subsequent appointment of the receiver will not deprive the execution creditor of the rights acquired by his levy.[2] If, however, a receiver is already appointed and is in possession of the firm assets for the benefit of all the creditors, no creditor will be permitted to levy upon and sell the property for his own benefit.[3]

§ 496. The fact that one partner fails to contribute his portion of the capital stock of the firm, as fixed by the articles of copartnership, and that he sells his interest in the firm to a third person, without the knowledge or consent of the other partner, coupled with his insolvency and refusal to pay any portion of the partnership indebtedness, and the fact that the purchaser has taken possession of the firm property and threatens to exclude the other partner therefrom, are sufficient grounds for granting an injunction and a receiver to take charge of the assets.[4]

§ 497. It is not sufficient ground for appointing a receiver, upon a bill for the settlement of partnership affairs, that the defendant partner has large sums of money belonging to the firm in his hands, when it is not shown that there is any danger of the money being ultimately lost to the

[1] Waring *v.* Robinson, Hoffm., 524.

[2] Van Alstyne *v.* Cook, 25 N. Y., 489. And see Davenport *v.* Kelly, 42 N. Y., 193.

[3] Knode *v.* Baldridge, 73 Ind., 54.

[4] Heathcot *v.* Ravenscroft, 2 Halst. Ch., 113.

plaintiffs, and no allegation is made that defendant is insolvent and unable to respond for the amount due.[1]

§ 498. In an action between partners, a receiver will not be appointed to take charge of and sell certain shares of stock in an incorporated company, which constitute the entire assets of the firm, when it is not determined how much of the stock belongs to each partner, the question depending upon the state of their accounts; and when it is not alleged that the defendant partner is insolvent, and he denies by his answer the equities of plaintiff's case and consents that one-half the stock may be transferred to plaintiff, and offers to give such security as the court may require to indemnify the plaintiff partner for any balance which may ultimately be found in his favor.[2]

§ 499. The fact that, after the dissolution of a partnership, the remaining partners continue to carry on the business on their own account, with the partnership effects, is sufficient ground to warrant the interference of equity by a receiver.[3]

§ 500. In case of a partnership formed for the purpose of sawing lumber, where by the articles of copartnership the partner having charge of the business was to take the timber used for the business from land belonging to the other partner, a violation of this part of the contract has been held a sufficient breach of duty to warrant an injunction and a receiver, when the business was shown to be in a declining condition and the firm indebtedness increasing.[4]

§ 501. When the appointment of a receiver of a partnership estate, in an action for an accounting between the partners, is dependent upon whether it was a partnership at will or for a term of years, and if at will whether it has actually been dissolved, the court will not determine the question upon a motion for a receiver, but may direct an issue to be tried at law as to whether there was a subsisting

[1] Wellman *v.* Harker, 3 Oregon, 520.

[2] Buchanan *v.* Comstock, 57 Barb., 568.

[3] Harding *v.* Glover, 18 Ves., 281.

[4] New *v.* Wright, 44 Miss., 202.

partnership between the parties.[1] So if, upon an application for a receiver on a bill for the settlement of partnership affairs, there is doubt as to whether plaintiff is entitled to an interest in the profits, the court may direct an issue to be tried by a jury, as to whether plaintiff is entitled to profits, and if so in what amount.[2]

§ 502. The courts are averse to appointing receivers in controversies between partners, without notice to the defendant partner and without service of process, especially when an injunction has already been granted which is ample to protect the property from loss until the motion for a receiver can be regularly heard.[3]

§ 503. As regards the jurisdiction of equity in cases of foreign partnerships, it is held, in Massachusetts, that a receiver will not be appointed against a non-resident purchaser of the interest of one partner, conducting the business in another state, although it would seem that as against such partner, if within the jurisdiction of the court, a receiver may be had.[4] And when an association in the nature of a partnership was formed in England, for the purpose of conducting mining operations in Brazil, and the property of the association in Brazil was vested in a trustee for management, upon a bill by a member of the association in England, in behalf of himself and all others, for an accounting and distribution of profits, the trustee having clandestinely left the country and having threatened to sell the property of the association, the court allowed a receiver and granted an injunction to restrain the trustee from selling, the relief being justified by the necessity of protecting the property.[5]

§ 504. Where plaintiffs, the owners of a farm, have entered into an agreement with defendant in the nature of a partnership, for working the farm and dividing the profits,

1 Fairburn *v.* Pearson, 2 Mac. & G., 144.

2 Peacock *v.* Peacock, 16 Ves., 49.

3 McCarthy *v.* Peake, 18 How. Pr., 138.

4 Harvey *v.* Varney, 104 Mass., 436.

5 Sheppard *v.* Oxenford, 1 Kay & J., 491.

with a provision that plaintiffs may terminate the partnership on six months notice, if the profits shall not reach a certain amount, upon showing that the profits have not reached the amount agreed upon, plaintiffs have been allowed an injunction and a receiver.[1]

§ 505. With regard to the effect of a receivership in partnership cases upon the rights of creditors, it is held, in California, that the filing of a bill by one partner for a dissolution and an accounting, and the appointment of a receiver thereon, will not prevent a general creditor of the firm from proceeding by attachment and judgment, and thus gaining a priority over other creditors, at any time before a final decree dissolving the firm. Until a dissolution of the partnership, it is held, it can not be known that the firm is insolvent or that the court will administer its assets, and it would, therefore, be unjust to deny a creditor not a party to that litigation the right to prosecute an action at law for the recovery of his demand.[2]

§ 506. Where, upon a bill for the settlement of partnership affairs and for a receiver, an injunction is granted and a receiver appointed, if, under the circumstances of the case, the injunction is regarded as a proper auxiliary to the receivership, upon overruling a motion to rescind the appointment of the receiver, the injunction will be continued until the hearing or further order of the court.[3]

§ 507. The right to invoke the aid of equity by the appointment of a receiver of partnership effects, in an action to wind up the firm affairs, is not limited to the parties themselves, and the jurisdiction may, under proper circumstances, be exercised in favor of the assignees of the partners who have succeeded to their interests in the firm. For example, where both partners have assigned and transferred their respective interests in the firm, upon a bill by the pur-

[1] Dunn *v.* McNaught, 38 Ga., 179.

[2] Adams *v.* Woods, 8 Cal., 152; Naglee *v.* Minturn, id., 540; Adams *v.* Woods, 9 Cal., 24. And see opinion of Burnett, J., in Adams *v.* Hackett, 7 Cal., 187.

[3] Williamson *v.* Wilson, 1 Bland, 428.

chaser or assignee under one of the partners against the assignees of the other, alleging their possession of the property as well as their insolvency and refusal to allow plaintiff to be let into possession, a proper case is presented for appointing a receiver, upon the general principles which govern the jurisdiction as between partners themselves.[1]

§ 508. In cases of limited partnerships, the courts of New York allow the appointment of receivers upon the insolvency of the firm, for the protection of all the creditors, and will not permit any creditor to obtain a preference in the satisfaction of his demand. It is held, in that state, that upon the insolvency of such a partnership its assets immediately become a trust fund to be divided equally among all the creditors, and it is the duty of the general partners to place this fund in the hands of a trustee for equal distribution among the creditors. And when the general partners neglect the performance of this duty, the court will appoint a receiver, who becomes entitled to the entire assets of the firm as they existed at the date of insolvency, and discharged of all liens suffered or created by the partners after that date.[2]

[1] Maynard *v.* Railey, 2 Nev., 313.

[2] Jackson *v.* Sheldon, 9 Ab. Pr., 127. See, also, Lottimer *v.* Lord, 4 E. D. Smith, 183. In Jackson *v.* Sheldon, 9 Ab. Pr., 127, the defendants in the case had formed a special or limited partnership under the statute of New York. Insolvency ensued, and judgments having been recovered against the partners by default, under which their stock was levied upon and partly sold, they made an assignment for the benefit of their creditors. Jackson, who was a creditor at large of the firm, brought this action to set aside the judgments and vacate the sales, and for the appointment of a receiver to take the assets and apply them for the benefit of all the creditors. The court, Davies, J., say, p. 133, after a review of the New York authorities: "These cases, therefore, fully sustain the proposition that as soon as the special partnership becomes insolvent, it is the duty of the general partners to place the assets of the firm in the hands of a competent trustee, to divide the same equally among its creditors. The question presented in this case is, whether, having neglected that duty, the court will permit them, by reason of such omission, to accomplish indirectly what they are prohibited from doing directly — give a preference among their cred-

§ 508 *a*. The appointment of a receiver in an action for the settlement of partnership affairs being merely ancillary to the principal relief sought, it constitutes no bar to the relief that a similar motion was denied in a former suit brought by the plaintiff partner for a settlement of the firm business, which suit was dismissed by plaintiff of his own motion. Such dismissal being without prejudice to plaintiff's rights, he is at liberty to bring another action with all its rights and incidents, including the right to apply for a receiver.[1]

itors. I think clearly not. The moment the firm became insolvent their effects became trust funds, to be divided equally among all their creditors. No one creditor could obtain a preference over another for payment out of this fund, by reason of any act of omission or commission on the part of these, whose duty it was immediately to place the funds and assets in the hands of a competent trustee. On the happening of insolvency, the assets of a limited copartnership, equally with those of a moneyed corporation, have attached to them the character of trust funds, in which all creditors are entitled equally to participate, and in which no one can share to the disadvantage of the others. . . The general partners of this special partnership, not having discharged the duty which the law casts upon them, on the happening of the insolvency of the partnership, by placing the trust funds in the hands of a competent trustee, for equal distribution among all the creditors, it is entirely competent for this plaintiff to invoke the aid of this court to accomplish the same result. It is the duty of this court to appoint a receiver for that purpose, who will be entitled to take charge of and possess himself of all the assets, funds, and effects of said partnership as they existed at the time of its insolvency, discharged of all liens suffered or created since the happening of that event, and to collect in the same, and to distribute the same equally among all the creditors of the partnership. The injunction and receiver as prayed for in the complaint should have been granted, and the order appealed from denying the same must be reversed with costs."

[1] Anderson *v.* Powell, 44 Iowa, 20.

II. Receiver Upon Dissolution of the Firm.

§ 509. It is the established doctrine in England, that a receiver in partnership cases can only be allowed when the relief is ancillary to a dissolution of the firm. And when the court can not foresee that it will ultimately decree a dissolution, or when the object of the suit is not to obtain a dissolution, but on the contrary to continue the partnership, the bill praying the establishment of the firm and the specific performance of the partnership articles, equity will not lend its extraordinary aid by a receiver.[1] And while, under the English practice, it is almost a matter of course to appoint a receiver upon a bill for the dissolution of a firm,

[1] Hall *v.* Hall, 3 Mac. & G., 79; Roberts *v.* Eberhardt, Kay, 148.

if the case presented is such as to entitle plaintiff to a dissolution, the court will not interfere and take the conduct of a partnership into its own hands, if, upon the case as presented, it is doubtful whether plaintiff is entitled to a dissolution.[1] The rule may be stated in general terms, that to warrant a receiver in partnership cases, such a state of facts must be shown by the party complaining as, if proven at the hearing, will entitle him to a dissolution.[2] And in considering whether the conduct of one partner has been such as to entitle the other to a dissolution, for the purpose of determining an application for a receiver, the court will consider not merely the specific terms of the partnership articles, but also the duties and obligations implied in every contract of partnership. And when it is obvious that the conduct of the defendant partner has been so injurious to the firm, and so inconsistent with his duties as a partner, as

[1] Goodman *v.* Whitcomb, 1 Jac. & W., 589; Chapman *v.* Beach, id., 594. The doctrine is well stated in Goodman *v.* Whitcomb, by Lord Eldon, as follows: "This is a bill filed for the purpose of having a dissolution of the partnership declared, and if the court can now see that that must be done, it follows very much of course that a receiver must be appointed. But if the case made stands in such a state that the court can not see whether it will be dissolved or not, it will not take into its own hands the conduct of a partnership which only may be dissolved. It may be a question whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future, but if what he has done does not give the other party a right to have a dissolution of the partnership, what right has the court to appoint a receiver, and make itself the manager of every trade in the kingdom? Where partners differ, as they sometimes do, when they enter into another kind of partnership, they should recollect that they enter into it for better and worse, and this court has no jurisdiction to make a separation between them because one is more sullen or less good-tempered than the other. Another court, in the partnership to which I have alluded, can not, nor can this court in this kind of partnership, interfere, unless there is a cause of separation which, in the one case, must amount to downright cruelty, and in the other must be conduct amounting to an entire exclusion of the partner from his interest in the partnership. Whether a dissolution may ultimately be decreed I will not say, but trifling circumstances of conduct are not sufficient to authorize the court to award a dissolution."

[2] Smith *v.* Jeyes, 4 Beav., 503.

to entitle plaintiff to a dissolution, a receiver will be appointed.[1]

§ 510. The English rule as above stated has been followed in this country, especially in the courts of New York, where the doctrine is well settled that a receiver will not be appointed over a subsisting partnership, unless it satisfactorily appears that plaintiff will ultimately be entitled to a decree for a dissolution and the winding up of the firm business.[2] The grounds relied upon by the courts in granting receivers are, the necessity of winding up the affairs of the firm and dividing the surplus, and they do not interfere for the purpose of continuing or managing the business, this being a responsibility which the courts will not usually assume.[3] And although a preliminary injunction has been granted, *ex parte*, upon a bill by a partner seeking a dissolution of the firm, it does not necessarily follow that a receiver will be appointed; and if the court is satisfied that no such case is presented as to entitle plaintiff to a final dissolution, it will refuse a receiver, leaving the injunction to be dissolved in due time upon proper motion.[4] But when, upon the dissolution of a partnership, the members of the firm can not agree upon the mode of adjusting its affairs, it is the usual practice of the courts, with a view to protect the rights of all parties in interest, to exclude the partners from participating in the adjustment of the firm business, and to appoint a receiver for that purpose, and to grant an injunction as a necessary adjunct of the receivership.[5] So when a partnership at will is dissolved, there being no provision in the articles as to the division of the property or as to the manner of closing up the firm affairs, the partners being unable to agree upon such matters, and the defendant

[1] Smith *v.* Jeyes, 4 Beav., 503.

[2] Garretson *v.* Weaver, 3 Edw. Ch., 385; Jackson *v.* DeForest, 14 How. Pr., 81.

[3] Jackson *v.* DeForest, 14 How. Pr., 81.

[4] Garretson *v.* Weaver, 3 Edw. Ch., 385.

[5] Van Rensselaer *v.* Emery, 9 How. Pr., 135.

partner claiming the entire interest in the lease and good-will, a proper case is presented for appointing a receiver.[1]

§ 511. While it is thus seen that courts of equity, both in England and in America, rarely interfere by a receiver in partnership cases unless it is apparent that plaintiff will ultimately be entitled to a dissolution of the firm, it is to be borne in mind that the mere fact of the case as presented being sufficient to warrant a decree for a dissolution does not of itself constitute sufficient ground for a receiver, in the absence of improper conduct or breach of duty by the defendant partner.[2] And when a partnership is dissolvable by mutual consent, or determinable at the will of either party, equity will not, as of course, assume control of the business by placing it in the hands of a receiver, although the party complaining is entitled to an immediate dissolution, but a receiver will be withheld unless the relief appears to be necessary to protect and preserve the interests of the parties.[3] The reason for the doctrine as here stated is found in the manifest injustice which would necessarily result if, in case of a partnership determinable at will, a court of chancery would as of course, and for no other reason than that such was the wish of one member of the firm, assume control of the business and place it in the hands of a stranger to the firm.[4] Especially will the court refuse to interfere by a receiver when, by the articles of co-partnership, the defendant partner was required to advance and has advanced the entire capital, the business being conducted by him in his own name and owned by him individually, the plaintiff's interest in the property upon a dis-

[1] McElvey *v.* Lewis, 76 N. Y., 373.

[2] Harding *v.* Glover, 18 Ves., 281. "I have frequently disavowed," says Lord Eldon in this case, "as a principle of this court, that a receiver is to be appointed merely on the ground of a dissolution of a partnership. There must be some breach of the duty of a partner, or of the contract of partnership." See, also, Cox *v.* Peters, 2 Beas., 39; Renton *v.* Chaplain, 1 Stockt., 62; Birdsall *v.* Colie, 2 Stockt., 63; Wilson *v.* Fitchter, 3 Stockt., 71.

[3] Cox *v.* Peters, 2 Beas., 39; Birdsall *v.* Colie, 2 Stockt., 63.

[4] Birdsall *v.* Colie, 2 Stockt., 63.

solution being only a share of the profits, and no suggestion of defendant's insolvency or irresponsibility being made, and no proof of fraud on his part.[1] Where, however, in addition to the fact of a dissolution, or a right to dissolve the firm, the plaintiff partner shows that the defendant is insolvent and that there is danger of loss if the firm assets are entrusted to his charge, sufficient ground is presented, to entitle plaintiff to the aid of a receiver.[2]

§ 512. When the partnership interest of one member of the firm is sold at sheriff's sale under execution against him, the purchaser at such sale stands in no better position than the partner himself, and a court of equity will not in behalf of such purchaser interfere with the other partner, by appointing a receiver to wind up the firm business, unless his gross misconduct calls for such interference. Especially will the court be justified in withholding relief, in such a case, when the bill does not allege insolvency of the defendant partner, and it does not appear that he is unable to respond for any interest to which the purchaser may be entitled on completion of the accounts, and when it is not shown that the purchaser ever called upon the defendant for an accounting.[3]

§ 513. While the aid of a receiver in partnership matters is usually confined to cases where the party aggrieved appears to be entitled to a dissolution, there are instances where a departure from the terms of the agreement between the partners for the management of their business has been considered sufficient ground for a receiver, even though the

[1] Cox *v.* Peters, 2 Beas., 39. "The true principle," says Green, Chancellor, p. 41, "is that adopted by Chancellor Williamson, viz., that where a partnership is dissolved by mutual consent, or determined by the will of either party, a court of chancery will not as of course assume the control of the business, or place it in the hands of a receiver. A receiver will be appointed only where it appears necessary to protect the interest of the parties." And see Renton *v.* Chaplain, 1 Stockt., 62; Birdsall *v.* Colie, 2 Stockt., 63.

[2] Randall *v.* Morrell, 2 C. E. Green, 343.

[3] Renton *v.* Chaplain, 1 Stockt., 62.

case as presented would not justify a dissolution and none was sought. Thus, when the proprietors of a theater had executed an agreement regulating the management of their business, and providing that the profits should be devoted exclusively to certain purposes, and that the treasurer should be directed so to apply them, but by a subsequent agreement the parties, then entitled under the original proprietors to seven-eighths of the theater, contracted for a different application of the profits, and otherwise affected or varied the rights of the owner of the remaining one-eighth interest, who had refused to become a party to the new agreement, a receiver was appointed upon a bill by the latter to enforce a specific performance of the covenants contained in the original agreement.[1]

§ 514. In the case of a valuable partnership business which has been built up by the joint labors and contributions of all the partners, upon a bill for a dissolution and a receiver, the court should be careful to preserve the business itself, if possible, and to put all parties upon a fair and equal footing with regard to it. And if it is apparent that the appointment of a receiver to direct a sale of the entire business, and to wind up the concern, would destroy its value without benefit to either party, the relief will be denied. And this is true, even though the dissensions which have sprung up between the partners are such as to make it manifest that the business can not be carried on advantageously, and although the case presented is otherwise sufficient to warrant a dissolution.[2]

§ 515. When both partners are desirous of a dissolution of the firm, and the circumstances of the case, as disclosed by bill and answer, are such as seem to require a dissolution, the bill charging and the answer admitting that plaintiff is excluded from the partnership premises, sufficient cause is presented for a receiver to collect the firm debts

[1] Const *v.* Harris, Turn. & R., 496.

[2] Slemmer's Appeal, 58 Pa. St., 168.

and take charge of the assets.[1] But when plaintiff relies for a dissolution and a receiver upon the fact that defendant has drawn from the business in excess of the sum stipulated in the copartnership articles, and this is denied by defendant's answer, which denies all the charges of the bill, the court will refuse an injunction and a receiver.[2]

§ 516. When, upon the dissolution of a partnership, one partner is authorized, by agreement between the parties, to close up the firm business, and its property and assets are turned over to him, upon his agreeing to hold the other partners harmless, notwithstanding his right, under the contract, to exclusive possession, if the bill shows that he is wasting or misapplying the funds, or that there is danger to the remaining partners from his insolvency or fraudulent conduct, a sufficient case is stated to justify a receiver.[3]

§ 517. In case of a partnership dissolvable at the pleasure of either of the partners, and which does, in fact, become dissolved by the insolvency of certain members of the firm, an attempt by the insolvent partners to appropriate the firm assets to the payment of their private indebtedness by an assignment thereof for the benefit of their creditors, is sufficient to entitle the other partners to an injunction and a receiver. And in such case, the receivership and the injunction should extend to and cover all of the firm assets in the hands of the defendant partners and their assignee, in order to prevent their misappropriation.[4]

§ 518. Where, upon the dissolution of a partnership, the partners sign and publish a notice of the dissolution, giving one partner the exclusive right to wind up and settle the affairs of the firm, the fact that such partner makes a general assignment of all the firm assets for the benefit of all

[1] Wolbert *v.* Harris, 3 Halst. Ch., 605.

[2] Henn *v.* Walsh, 2 Edw. Ch., 129.

[3] Drury *v.* Roberts, 2 Md. Ch., 157. But the receiver was discharged on the coming in of defendant's answer, denying the equities of the bill.

[4] Davis *v.* Grove, 2 Rob. (N. Y.), 134; Same *v.* Same, id., 635.

the firm creditors, equally and without preference, will not of itself be deemed sufficient cause for a receiver, when no ground is shown for believing that the fund in the hands of the assignee is in danger, and when he is abundantly able to respond in damages.[1]

§ 519. When either member of a partnership has the right to dissolve the firm at will, and the articles make no provision for closing up the concern, the appointment of a receiver on a bill for that purpose, in the event of a disagreement between the partners as to closing up the firm business, is almost a matter of course.[2] And in such a case, the court will direct the receiver to apply the partnership property and funds in payment of all debts of the firm ratably, without preference to the favorite creditors of either partner.[3]

§ 520. It is competent upon the final judgment, in an action for the dissolution of a partnership, to appoint a receiver as part of the decree or judgment of the court, and to direct him to take possession of the partnership property and sell the same, and to collect the outstanding debts and distribute the proceeds among the partners according to their respective shares. And it is not sufficient ground for reversing such a judgment or decree, that the receiver thus appointed was not required to give bond, it being regarded as the fault of the defendant in not asking for a bond.[4]

§ 521. While, as is thus seen, the aid of a receiver may be granted as part of the final decree in the cause, the relief is usually granted upon interlocutory application on filing a bill for a dissolution and an accounting. And it is frequently the case that the court, as a necessary adjunct to the relief sought by the bill, will also grant an interlocutory injunction to restrain defendant from interfering with the management of the business, pending the proceedings for a dissolution.

[1] Hayes *v.* Heyer, 4 Sandf. Ch., 485.

[2] Law *v.* Ford, 2 Paige, 310; Marten *v.* Van Schaick, 4 Paige, 479.

[3] Law *v.* Ford, 2 Paige, 310.

[4] Shulte *v.* Hoffman, 18 Tex., 678.

III. Exclusion from Firm as Ground for Receiver.

§ 522. In actions for the dissolution of partnerships and the winding up of their affairs, the fact that one partner has excluded the other from participation in the profits of the business, or from his share in its management and control, has always been regarded as one of the strongest grounds for equitable relief by the appointment of a receiver.[1] And it was said by Lord Eldon, that the most prominent consideration on which the court acts in appointing a receiver of a partnership business is the circumstance of one partner having taken upon himself the right to exclude another from as full a share in the management of the firm business as he who assumes that power himself enjoys.[2] And it was said by the same authority, that as, in the ordinary course of trade, if one partner seeks to exclude another from his due share in the business, the court will grant a receiver, so in the course of winding up the partnership affairs the court will, when necessary, interpose on the same principle.[3]

[1] See Gowan *v.* Jeffries, 2 Ashm., 296; Wilson *v.* Greenwood, 1 Swans., 471; Const *v.* Harris, 1 Turn. & R., 525; Kirby *v.* Ingersoll, 1 Doug. (Mich.), 477; Katsch *v.* Schenck, 18 L. J., N. S. Ch., 386; Wolbert *v.* Harris, 3 Halst. Ch., 605.

[2] See observations of Lord Eldon in Const *v.* Harris, Turn. & R., 525.

[3] Wilson *v.* Greenwood, 1 Swans., 471.

§ 523. In illustration of the general doctrine of exclusion from the firm as ground for a receiver, it is held, that where one partner, without the knowledge or consent of his copartner, assigns and transfers all the firm effects, with the evident purpose of shutting out the other partner from any participation in the settlement of the firm business, the assignment having the effect of discontinuing the business and of excluding the other partner from examining the books or controlling the firm property, a sufficient case is presented to warrant the interposition of equity by a receiver. And in such case, the assignee can have no claim, even as to the interest of the assigning partner, sufficient to defeat the application.[1]

§ 524. Where defendant had entered into a contract with plaintiff that he would pay him a given sum as salary for his services in defendant's business, and in addition thereto would give him a certain proportion of the net profits of all new business obtained through him, the agreement was regarded as constituting a partnership; and defendant having excluded plaintiff from all participation in the profits of the business, upon a bill for a dissolution and an accounting, a receiver was allowed. In such a case, the plaintiff, being entitled to a share in the profits, has an interest in seeing that the business out of which the profits arise is properly disposed of, and, upon being excluded therefrom, he is entitled upon principle to have a receiver when the parties can not come to an amicable adjustment of their differences.[2]

§ 525. In the application of the doctrine of exclusion as a ground for appointing a receiver in partnership cases, it is not absolutely necessary that the court should be satisfied that the partnership fund is in peril. And where the fund in dispute is *prima facie* the proceeds of the partnership, and the defendant refuses to allow his copartner to participate therein, and excludes him from all participation in

[1] Kirby *v.* Ingersoll, 1 Doug. (Mich.), 477.

[2] Katsch *v.* Schenck, 18 L. J., N. S. Ch., 386.

the profits, so that the rightful ownership of the fund can not be determined until a final adjustment of their affairs, it is proper to continue a receiver in possession. Under such circumstances, the inability of the partners to come to an adjustment of their interests would seem to render it a provident exercise of the powers of a court of equity to continue in charge of the property until it can finally determine the rights of the parties.[1]

§ 526. When a partner sells his interest in the business to a third person, although such sale in effect works a dissolution of the firm, the remaining partner is not entitled to the exclusive use and possession of the property, and if he excludes the purchaser from participation therein, denying not only his rights but the rights of the partner from whom he purchased, and sets up an adverse title to the property, sufficient cause is shown for appointing a receiver.[2]

§ 527. In case of the dissolution of a partnership by proceedings in bankruptcy against one member of the firm, the assignees of the bankrupt partner become, as to his interest, tenants in common with the solvent partner. And in such a case, upon an application for a receiver on the ground of exclusion, a court of equity will proceed upon the same principles by which it is governed in all cases where some members of a firm seek to exclude others from that share in the management of the business to which they are entitled.[3]

[1] Speights *v.* Peters, 9 Gill, 472. Mr. Justice Frick observes, p. 479: "It is assumed by the appellant that the court, as preliminary to the appointment of a receiver, must also be further satisfied that the property is in imminent peril. This, however, is not always a necessary condition of the action of the court. Against the legal title, or a strong presumptive title in the defendant, the court would interfere with great reluctance, and only where the property was in danger of being materially injured or lost. But in respect to a fund which is claimed and is *prima facie* the proceeds of a partnership, it is but a provident exercise of equity power to place the property under the care of the court."

[2] Seibert *v.* Seibert, 1 Brews., 531.

[3] See observations of Lord Eldon in Wilson *v.* Greenwood, 1 Swans., 482, 483.

§ 528. Where there were several partners jointly interested in a vessel, and the defendant partners had been in possession, acting as ships-husbands and brokers, and had acted in fraud of the plaintiffs by clandestinely making a profit from the employment of the vessel for their own exclusive benefit, upon a bill for an accounting, it was held a sufficient case to warrant the appointment of a receiver *ad interim*, to take possession of the vessel's machinery, which had been removed for repairs, and of which defendants had possessed themselves to the exclusion of plaintiffs.[1]

§ 529. A receiver will be appointed upon a bill by one partner for a settlement of the partnership affairs, when it is alleged that defendant refuses to make any settlement and denies plaintiff access to the firm books, and that he has failed to pay the firm indebtedness, and has fraudulently appropriated the partnership funds to his own use and diminished the firm assets. Such a case is regarded as presenting such elements of fraud and imminent danger, as to clearly warrant the extraordinary aid of the court.[2]

[1] Brenan *v.* Preston, 2 DeG., M. & G., 813.

[2] Haight *v.* Burr, 19 Md., 130. See, also, Barnes *v.* Jones, 91 Ind., 161; Shannon *v.* Wright, 60 Md., 520.

IV. Receiver Upon Death of Partner.

§ 530. The jurisdiction of equity in appointing receivers in partnership cases is sometimes called into exercise by reason of the death of one or both partners. It was the doctrine of the English Court of Chancery, established at an early date, that upon the death of both members of a copartnership, a receiver would be appointed. And the grounds for the relief in such case were, that no such confidence exists as between the representatives of the deceased partners, as existed between the partners themselves.[1]

§ 531. Ordinarily, in case of the death of a single member of a copartnership, since the surviving partner has a legal right to possession of the firm assets and to wind up the business, he will not be deprived of this right by a receiver, unless upon proof of mismanagement or of danger to the partnership effects.[2] And while it is true that equity interferes by a receiver with much less reluctance when the partnership has been dissolved, than when it is still in ex-

[1] Phillips *v.* Atkinson, 2 Bro. C. C., 272. "Where there is a copartnership," says Lord Kenyon, "there is confidence between the parties, and if the one dies the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and therefore the court will appoint a receiver."

[2] Connor *v.* Allen, Harring. (Mich.), 371; Walker *v.* House, 4 Md. Ch., 39.

istence, yet where the proceedings are instituted against a surviving partner by the representatives of a deceased member of the firm, the court will not interfere without being first satisfied, by the mismanagement or improper conduct of the survivor, that the confidence reposed in him was misplaced.[1]

§ 532. Where, however, the surviving partner is guilty of mismanagement and of improper conduct in his control of the firm business, a different case is presented, and courts of equity are, under such circumstances, inclined to a somewhat liberal exercise of their extraordinary jurisdiction, in behalf of the representatives of a deceased partner.[2] And in case of the death of one member of a firm, in the absence of any partnership articles, or of any provision for a continuance of the business by the administrators or representatives of a deceased partner, if the survivor refuses to proceed within a reasonable time to close up the firm business, and continues to manage it in his own name, and for his own benefit, equity will grant an injunction against its continuation and will appoint a receiver, upon a bill filed by the administrator of the deceased partner.[3] In such a case, the survivor is regarded as a trustee for the creditors and representatives of the deceased partner. And the laws of the state requiring an executor or administrator to close up the estate of the deceased within one year, the same rule was held applicable by analogy to the surviving partner, and he having delayed and refused a settlement for a period of fourteen months, using the firm property during this entire period for his own benefit, it was held, that there had been such improper delay as to warrant the interposition of equity.[4] So where, by the terms of the partnership articles, it is provided that in case of the death of either

[1] Walker *v.* House, 4 Md. Ch., 39.

[2] Holden's Adm'rs *v.* McMakin, Par. Eq. Cas., 270; Madgwick *v.* Wimble, 6 Beav., 495; Miller *v.* Jones, 39 Ill., 54.

[3] Holden's Adm'rs *v.* McMakin, Par. Eq. Cas., 270.

[4] Holden's Adm'rs *v.* McMakin, Par. Eq. Cas., 270.

partner, the option shall be given his representatives of continuing the business, but upon the death of one partner the survivors insist that they are entitled to continue the firm with the funds of the deceased, and to compel his representatives to be partners therein, they are entitled to a receiver as against the surviving partners.[1]

§ 533. The administratrix of a deceased partner has a sufficient interest in the firm property, as the personal representative of the deceased, to entitle her to the appointment of a receiver over the interest of the deceased in the firm assets, upon a bill for the settlement of the partnership affairs.[2] And while the administrator of a deceased partner primarily has nothing to do with the collection of firm debts or with the management of firm assets, it being the duty of the survivors to settle the partnership affairs, yet if there should be an unreasonable delay in the performance of this duty, or if the survivors are wasting the partnership property, it becomes the right and duty of the administrator to institute proceedings against the survivors for an accounting and a receiver, in order that the affairs of the partnership may be properly adjusted. In such case, the administrator may himself, if otherwise a proper person, be appointed receiver, the court, however, requiring him to give an additional bond with satisfactory security.[3] The proper decree

[1] Madgwick *v.* Wimble, 6 Beav., 495.

[2] Clegg *v.* Fishwick, 1 Mac. & G., 294.

[3] Miller *v.* Jones, 39 Ill., 54. The principles by which courts of equity are governed, in this class of cases, are very clearly stated in the opinion of the court by Mr. Justice Lawrence, p. 60, as follows: "The law governing the relations of the administrator of a deceased partner to the surviving partner, so far as concerns any questions involved in this case, is well settled. Primarily, the administrator has nothing to do with either the partnership assets or the partnership debts. The surviving partners take the exclusive legal title to the former for the payment of the latter. If any assets remain in their hands after payment of all liabilities, they should account to the administrator for the distributive share of the deceased, which then becomes, for the first time, assets in his hands as administrator. If, however, there is an unreasonable delay on the part of the surviving partners in

in such a case is, that the receiver be appointed upon giving the required bond, and that the surviving partners pay over to him such money as has come to their hands, and has not been expended by them in the payment of partnership debts and in the legitimate expenses of the business. They should also be required to deliver to the receiver all evidences of debt and choses in action against debtors of the firm, and all personal property, if any, belonging to the firm, and should be enjoined from the collection of any debts due to the partnership.[1]

§ 534. In the class of cases under consideration, when the administrator or representative of the deceased partner procures the appointment of a receiver of the partnership effects, the receiver by virtue of his appointment is invested with all the rights and equities of the deceased partner, for the purposes of the trust with which he is clothed. And he completely represents the equitable rights of the administrator and of the deceased, for the purpose of administering the assets of the firm and applying them in payment of the partnership indebtedness.[2]

§ 535. Where a legatee of a deceased partner was entitled to his share of the profits accruing from the partnership business, and continued the business with the surviving member of the firm for a long period of years, being treated as a partner and receiving his share of the profits, and he afterward filed a bill for a dissolution, and defendant denied his right to an accounting or to any relief, upon the ground that plaintiff, being a minister, was incapacitated under an act of parliament from engaging in any

closing the affairs of the partnership, or if they are wasting the partnership property, it is then the right and duty of the administrator, if the partnership creditors remain inactive, to file a bill, as in the present instance, calling the survivors to account and praying for an appointment of a receiver and the complete adjustment of the partnership affairs. The administrator himself, if a proper person, may be made receiver, but in that event the court should require him to give a new bond as such."

[1] Miller v. Jones, 39 Ill., 54.

[2] Tillinghast v. Champlin, 4 R. I., 173.

trading business, and defendant claiming the entire property for himself, a receiver was allowed.[1]

§ 536. In Louisiana, it is held, that a court having jurisdiction of an action for the settlement of partnership affairs, has power to appoint a receiver, notwithstanding the death of one partner and the appointment of an executor or administrator of his estate; and that such appointment is of itself sufficient authority for the receiver to institute an action to recover money due the firm.[2]

§ 537. Where a bill in equity is filed by creditors of a partnership against the surviving members of the firm, for the settlement of the firm accounts and for a receiver, and the answer admits all the material facts alleged in the bill, it is proper to appoint a receiver to take charge of the partnership assets.[3]

[1] Hale *v.* Hale, 4 Beav., 369.

[2] Helme *v.* Littlejohn, 12 La. An., 298.

[3] Dick *v.* Laird, 4 Cranch C. C., 667.

V. Functions and Duties of the Receiver.

§ 538. Upon the appointment of a receiver in an action for the dissolution of a partnership, it is his duty to proceed without delay to collect the outstanding debts.[1] And when a receiver of partnership effects is appointed in proceedings under judgments against the firm, and the appointment has become perfected by his giving the requisite security, he becomes at once entitled to possession of the firm assets, which are regarded as being in the custody of the court, and not to be disposed of without a hearing of all par-

[1] Jackson *v.* DeForest, 14 How. Pr., 81.

ties in interest. And it is improper, in such case, to enjoin the receiver from the management of the property or fund, since this would be in effect equivalent to restraining the court itself from disposing of the funds which may come into the hands of its officer.[1] But the appointment of a receiver, in an action for an accounting and settlement of partnership affairs, will not be extended so as to include and direct the taking possession of specific property alleged to belong to the firm, when the question of whether it is or is not partnership property is directly in issue by the pleadings, and is one of the points in controversy in the litigation.[2] And upon an application for a receiver in partnership cases, the court will not undertake to determine what is and what is not partnership property, as between members of the firm and third persons, and if disputes arise with reference to any particular property claimed by third persons, the proper course is to determine the controversy by an action either for or against the receiver.[3]

§ 539. A receiver of the effects of a partnership, appointed in an action for the settlement of the firm business, is regarded as vested with the whole equitable title to the partnership property, without any assignment for that purpose, and in an action to obtain possession of the property he represents the interests therein of all parties to the suit in which he was appointed. And it is held, that to enable him to properly discharge his trust, he may, *suo motu*, and without special leave of the court, bring an action to possess himself of the property to which he is officially entitled, incurring no risk thereby except as to costs, and, least of all, have the persons against whom he brings such action the right to object that he brings suit without leave of court.[4] And since a receiver's authority is conferred by law, and not like that of a voluntary assignee of the par-

[1] Van Rensselaer *v.* Emery, 9 How. Pr., 135.

[2] Gregory *v.* Gregory, 1 Sweeny, 613.

[3] Higgins *v.* Bailey, 7 Rob. (N. Y.), 613.

[4] Tillinghast *v.* Champlin, 4 R. I., 173.

ties, a receiver of a partnership succeeds, not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm and of its beneficiaries.[1] Ordinarily, however, the receiver is not entitled to sue for the recovery of debts due to the firm without leave of court.[2] But in an action brought by the receiver to foreclose a vendor's lien upon real estate which has been sold by him, it constitutes no defense that one of the partners was not a party to the suit in which the receiver was appointed, when it is not shown that such partner was then alive and within the jurisdiction of the court, or that he had a substantial interest in the partnership.[3] And when the receiver is authorized to sell all the property, choses in action and effects of the firm within the jurisdiction of the court, a purchaser at such sale will acquire a good title to choses in action and accounts due to the firm from persons residing beyond the limits of the state, the partners themselves residing within the state and the court having full jurisdiction over them. In such case, the members of the firm can not afterward maintain an action against the purchaser to compel him to account for the proceeds which he has collected from parties residing beyond the state.[4]

§ 540. As regards the selection of a proper person to be appointed receiver over a copartnership, upon the dissolution of the firm, the general principles governing in the selection of receivers are applicable, and these have been elsewhere discussed.[5] A plaintiff partner, in an action for a dissolution of the firm, has sometimes been appointed re-

[1] Wallace *v.* Yeager, 4 Phila. R., 251; Pearce *v.* Gamble, 72 Ala., 341.

[2] Fincke *v.* Funke, 25 Hun, 616. And see as to the right of such a receiver to maintain an action to recover firm goods which have been seized under a chattel mortgage executed by one member of the firm after the other partner has become insolvent and assigned his interest for the benefit of his creditors, Ogden *v.* Gregg, 29 Hun, 146.

[3] Stelzer *v.* La Rose, 79 Ind., 435.

[4] Loney *v.* Penniman, 43 Md., 130.

[5] See chapter III, *ante*, Of Selection and Eligibility.

ceiver, although the practice in this country is an unusual one, and only to be justified upon the implied condition that he will discharge the duties of his trust free of charge. Such a receiver will not, therefore, be allowed any compensation for his services in managing the property entrusted to his charge.[1] But if the partners having a three-fourths interest in the firm agree upon one of their number as receiver, and the principal creditors of the firm unite in the application for his appointment, he being otherwise well qualified for the position, it is proper to appoint him upon his undertaking to act without compensation.[2] The English practice seems to be to give each of the partners liberty to propose himself to act as receiver without salary.[3] But the partner who may be appointed no longer acts in the capacity or sustains the relation of a partner, but is an officer of the court, having given due security to account for the moneys which he may receive in his official capacity, and being responsible directly to the court for his conduct.[4] Where, therefore, the defendant partner is appointed receiver, in an action for the settlement of partnership affairs, and uses a part of the firm assets in private speculations for his own benefit, the other partner can not maintain a bill in equity for a division of the profits realized out of the speculation, the defendant holding the funds not in the capacity of a partner, but as a receiver and officer of the court.[5]

[1] Brien *v.* Harriman, 1 Tenn. Ch., 467.

[2] Todd *v.* Rich, 2 Tenn. Ch., 107.

[3] Blakeney *v.* Dufaur, 15 Beav., 40; Sargant *v.* Read, 1 Ch. D., 600.

[4] Blakeney *v.* Dufaur, 15 Beav., 40.

[5] Whitesides *v.* Lafferty, 3 Humph., 150. The court, Turley, J., say, p. 151: "There is no pretense for saying that complainant is entitled to this division, upon the ground that it was a partnership transaction; the relation of partners did not exist between the parties at the time; it had been dissolved, and defendant held the moneys, not as partner, but as receiver. We know of no principle which creates such a relation between a receiver and a party to a suit, as makes him liable for profits made by a use of the money during the continuance of his receivership; he is an officer appointed by the court, responsible to the court

§ 541. A receiver in partnership cases is entitled to and will be allowed by decree of court the possession of all money in the hands of the surviving partners, as well as all evidences of indebtedness and choses in action due to the firm, and all assets and personal property of the firm. And the court may, if necessary, enforce its decree for the delivery of such assets by the surviving partners to the receiver, by process of attachment.[1]

§ 542. Where, pending an action for the dissolution of a firm and the settlement of its affairs, one of the partners is appointed receiver, he will not be allowed, by virtue of his appointment, to withhold partnership funds, collected in his capacity as receiver, upon the ground that they are due to him personally, since to allow such an application of the funds would necessarily defeat the very object of his appointment, and would constitute a flagrant breach of trust. And the partner acting as receiver has no greater right to the control of funds collected by him in that capacity than have his copartners, the entire fund being under the control and subject to the disposal of the court.[2]

for the discharge of his duties, and personally liable for any loss of the funds in his hands."

[1] Miller *v.* Jones, 39 Ill., 54.

[2] Gridley *v.* Conner, 2 La. An., 87. Eustis, C. J., says, p. 89: " . . We deem it proper to state what we conceive to be the law in relation to the obligations of a partner, who, pending a suit for a settlement and liquidation of a partnership, collects money belonging to the partnership under the appointment from the court. A partner so receiving it has no right to withhold it from the action and control of the court, under any plea or pretense personal to himself. He can not be permitted to defeat the very object of his appointment, by violating or evading his trust. If receivers, partners or others are thus permitted to retain the fund from creditors, and as the cause progresses, involving them in new litigation, how can the partnership be settled in the presence of these hydra pretensions? The retention of funds collected under the authority of the court is a flagrant breach of trust, and the power to compel their immediate subjection to its control itself unquestionable; and without the vigilant and efficient exercise of this power on all proper occasions, the judicial settlement of the concerns of a partnership would become a mere farce. After the dissolution of a partnership, and pending its liquidation, a partner is not permitted to do any act, still less make use of the partner-

§ 543. When proceedings are pending in a court of inferior common-law jurisdiction for the settlement of partnership affairs, and a receiver has been appointed, but the question of the jurisdiction of the inferior court is in doubt, it is improper for that court, pending an appeal for the determination of its jurisdiction, to direct its receiver to sell the partnership property, and such sale should be held in abeyance until the question of jurisdiction is properly determined.[1]

§ 544. A receiver of a partnership may be required by order of court, upon the application of defendants in the cause, to produce for examination before a master in chancery all books of account relating to his management of the firm business, or to receipts and payments made by him in and about the business; but the court will not order him to submit to an inspection of the books upon his own premises, since it can not order that defendants may enter another man's house.[2]

§ 545. In Louisiana, it has been held, that the payment of partnership debts by a receiver appointed by consent of the partners, out of funds collected by him in his official capacity, constituted a sufficient answer to a rule upon the receiver to show cause why he should not pay the money into court, the receiver being treated as the agent of the parties for the purposes of such payment. It was accordingly held to be error, on the hearing of the rule to show cause, to reject testimony offered by the receiver to prove

ship funds in a manner inconsistent with the purpose of a just and proper settlement; and it has been held that, where a partner has collected partnership money under circumstances from which an agreement on his part not to receive it can be inferred, and where his receiving it was contrary to good faith, he may be held to pay the money into court. In this case, Conner was permitted to retain as a partner the money he has collected as receiver, and confound it with the partnership affairs. We think the money thus collected ought to have been paid into court, and that Conner had no more right over it than his copartners had."

[1] McNab *v.* Noonan, 28 Wis., 434.

[2] Maund *v.* Allies, 4 Myl. & Cr., 503.

that he had paid the firm debts, and that they were justly due.[1]

§ 546. Upon a bill by one member of a firm for a dissolution, a receiver should be appointed to collect such debts as the remaining partners are enjoined from collecting; and the receiver thus appointed may be required, by order of court, to pay over to plaintiff such proportion of the collections as he is entitled to receive.[2]

§ 547. When the chief value of a partnership business is its good-will, which has been built up by the joint efforts of all the partners, and the business is of such a nature that it is impossible for a receiver to conduct it, as in the case of a partnership for carrying on an insane hospital and lazaretto for foreign immigrants, it is proper for the court to direct the receiver to sell the lease of the premises where the business is conducted, together with the good-will. And in such case, for the purpose of giving efficacy to the sale of the good-will, the court will permit either of the parties to become a purchaser, and will enjoin the remaining parties from conducting the same business in that locality.[3]

§ 548. Where, upon a bill for divorce, filed by the wife against the husband who has absconded, a receiver is appointed to take charge of the husband's effects, his appointment does not divest the husband's title to partnership property, and the receiver has no right to dispossess the other partner. If, therefore, he has taken possession of the firm property under a misapprehension of his rights and duties, he will be required to make restitution thereof to the other partner.[4]

§ 549. A receiver appointed over a partnership stock in trade, in the business of brewing, has been directed to act

[1] Kellar *v.* Williams, 3 Rob. (La.), 321.

[2] Maher *v.* Bull, 44 Ill., 97. As to the right of the partners to a participation in the profits realized by the receiver during his continuance of the business, see McMahon *v.* McClernan, 10 W. Va., 419.

[3] Williams *v.* Wilson, 4 Sandf. Ch., 379.

[4] Hamill *v.* Hamill, 27 Md., 679.

as clerk in the trade, and to collect in debts according to the course of the business, to pay excise duties and other charges, and to bring actions in the name of the partners.[1]

§ 550. When, upon dissolving a partnership, it is agreed between the partners that the firm notes shall be paid by the members continuing in business under a new partnership, a part of the consideration for such agreement being the sale of the retiring partner's interest, who is afterward compelled to pay the notes, he has the same remedy against a receiver of the assets of the new firm to recover the amount paid, that he would have had against the new firm itself before the appointment of a receiver, and may maintain an action against the receiver to recover the amount paid.[2]

§ 551. Where, in an action to dissolve a partnership and to wind up its affairs, a receiver is appointed and takes possession of the firm property, a subsequent purchaser of one partner's interest in the firm can not, as assignee or purchaser of such interest, interfere with the rights and duties of the receiver, or with any property in his hands, since he acquires by his purchase only such interest as his vendor might have had in the partnership assets, after all liabilities of the firm were discharged.[3]

§ 552. A receiver appointed on a bill for the dissolution of a partnership, being an officer of court, and the funds in his hands being in custody of the law, it has been held that such funds are not subject to attachment or garnishment by the firm creditors, and can only be disposed of by direction of the court, not being subject to the action of the parties to the litigation or of their creditors.[4]

[1] Skipp *v.* Harwood, Dick., 114.

[2] Allyn *v.* Boorman, 30 Wis., 684.

[3] Noonan *v.* McNab, 30 Wis., 277.

[4] Receiver of Adams & Co. *v.* Roman, unreported, cited in opinion of Terry, J., in Adams *v.* Hackett, 7 Cal., 187. But see opinion of Burnett, J., in Adams *v.* Hackett, 7 Cal., 187, holding that, until a dissolution of the partnership has been judicially declared and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and may thereby gain

§ 552 *a*. The receiver of an insolvent copartnership will not be required to pay in full a balance due from such firm to creditors who had deposited money with the firm from time to time as security for advances, the deposit not being a special one, or of any specific money, and neither the firm nor the receiver having any specific fund upon which such creditors have a charge or lien.[1]

a preference over less diligent creditors. And see Adams *v.* Woods, 8 Cal., 152; Same *v.* Same, 9 Cal., 24; Naglee *v.* Minturn, 8 Cal., 540.

[1] Butler *v.* Sprague, 66 N. Y., 392. See, also, Attorney-General *v.* Continental Life Insurance Co., 71 N. Y., 325.

CHAPTER XIV.

OF RECEIVERS OVER REAL PROPERTY.

I. Principles Upon Which the Relief is Granted.

§ 553. The jurisdiction exercised by courts of equity in appointing receivers over real property, for its better protection and to secure the rents and profits *pendente lite*, although well established both in England and in America, is yet regarded as an extremely delicate branch of equity jurisdiction, and one whose exercise should be guarded with the utmost caution. It will, hereafter, be shown that the courts are exceedingly averse to any interference *in limine* with the possession of real estate by a defendant, claiming under legal title, and that equity will only interpose a receiver, as against such possession, in cases of great emergency, the general rule being that conflicting questions of title should be determined in courts of law.[1] And while, as will be shown, there are frequent cases where the relief is granted, upon special circumstances of an equitable nature appealing strongly to the conscience of the court, such cases will be found upon investigation to illustrate and strengthen the general tendency already indicated.

§ 554. It was the established doctrine of the English Chancery, that the court would never exercise its extraordinary powers by appointing a receiver over real property, in behalf of a claimant out of possession, except in aid of an equitable title.[2] And a broad distinction is recognized between interfering with the possession of real estate by a receiver, and cases where the relief is extended for the preservation of personal property *pendente lite;* since in the case of personalty it is the whole property, the *corpus*, which equity is called upon to protect by a receiver, and

[1] See *post*, § 557.

[2] Carrow *v.* Ferrior, L. R., 3 Ch. App., 719.

which may be lost without the interference of the court, while in the case of real property the court is only asked to preserve the rents and profits, which are merely the proceeds of the property *de anno in annum*, and which do not, therefore, demand the same summary interference.[1] Where, therefore, there are several conflicting claimants to an estate asserting their title as heirs-at-law of the deceased owner, and no impediment is shown to a trial of their rights at law, equity will not entertain jurisdiction of the controversy by appointing a receiver in behalf of one of the claimants not in possession who presents no equitable title, but a mere legal title or right which may be asserted and established in a court of law. Nor does the fact that there are outstanding terms, in such case, present any additional ground for relief in equity by a receiver.[2]

[1] Carrow *v.* Ferrior, L. R., 3 Ch. App., 719. And see opinion of Vice-Chancellor Wood in Talbot *v.* Hope Scott, 4 Kay & J., 132.

[2] Carrow *v.* Ferrior, L. R., 3 Ch. App., 719. This was a contest between three claimants as heirs-at-law of a deceased lunatic, two of the heirs having filed separate bills, alleging the existence of outstanding terms, and praying for a receiver of the real estate until the question of heirship could be determined, the third claimant proceeding by a petition in lunacy. The right to a receiver was denied, Lord Justice Wood observing as follows, p. 728: "In this case there are three claimants, none of whom has established his title as heir-at-law. There is no privity or contract between them. There is nothing binding any of them to take any other course than that of standing on his strict rights, and we are asked to decide that one of them can come here and ask the court to put a receiver in possession, though there is no allegation of any impediment to a trial at law beyond the existence of outstanding terms. I considered this point much in Talbot *v.* Hope Scott, 4 K. & J., 96, but do not regret having heard it reargued, though considering the vast amount of property involved in that case, and the hostile feeling between the parties, the fact of there having been no appeal is significant. I then came to the conclusion that there was no jurisdiction to appoint a receiver on the application of a claimant who was out of possession and did not claim by an equitable title, and I am still of the same opinion. The plaintiff's case was there rested on the ground of the court's jurisdiction to interfere for the protection of property pending litigation, but that question had been fully discussed in Jones *v.* Jones, 3 Meriv., 161, which seemed to me to have so settled the law that I ventured

§ 555. It necessarily follows from the doctrines above considered, as well as from the general principles governing the extraordinary jurisdiction of courts of equity, that the aid of an injunction and a receiver will not be granted in a contest concerning the possession of real property, when adequate redress may be had at law in the usual forms of action appropriate to such end; and in all such cases, equity will leave the parties aggrieved to pursue their legal remedy. Thus, upon a bill by a devisee of real estate, claiming title and right of possession, and alleging that defendant has unlawfully intruded into possession, and has continued to hold without right or authority, receiving the products and depriving plaintiff of all means of support, the bill seeking

to say there had been no case for twenty years in which a person claiming by a dry, legal title as heir-at-law, and out of possession, had ever attempted to obtain the appointment of a receiver. The question as to the effect of outstanding terms is disposed of by Bainbrigge *v.* Baddeley, 3 Mac. & G., 413. The Vice-Chancellor has observed, upon this decision, as being the reversal by the Lord Chancellor of a decision by a judge having much greater experience than himself in courts of equity, but I can only look at it as a judgment of a lord chancellor differing from an inferior judge. It was held in that case that the existence of outstanding terms makes no difference as to the appointment of a receiver, the course of the court being merely to put the outstanding terms out of the way, and not to treat them as introducing any new equities. It was urged that this was not a case where the court is asked to turn any one out of possession, but a case where the possession is vacant, and that the court will interfere to protect the property as it does to protect personal estate pending a litigation as to probate. I had occasion to consider this in Talbot *v.* Hope Scott, 4 K. & J., 96, and I observed that the two cases were different. It may be true, on the highest general principles, that there ought to be no difference in this respect between real and personal property, but our law clearly regards them very differently, and looks upon the person in possession of real estate as entitled to keep it till some one else shows a better title. Unless the person in possession of real estate is affected by some equity, this court will not interfere. The consideration is not unimportant that personal estate may be made way with altogether, if this court does not interfere, but only the rents of real estate can be lost. But, in my opinion, the leading principle governing the case is that this court does not interfere as to real estate unless there is an equity."

an injunction and a receiver and to quiet and declare plaintiff's title, no sufficient cause is presented to warrant the aid of equity, even though it is alleged that the defendant in possession is insolvent. In such a case, plaintiff claiming the legal title, should assert that title in a court of law by some appropriate action, and equity will not interfere.[1]

§ 556. In actions affecting the title to real property, when a receiver is sought to take charge of the property, and to preserve the rents and profits pending litigation, the appointment of the receiver in no manner affects the title of either party to the litigation, although the relief can only be granted in behalf of one having an acknowledged interest, or when there is a strong probability of his ultimate recovery. The receiver is appointed for the benefit of the person making the application, and for any other parties in interest who may choose to avail themselves of the proceedings. The primary object in making such appointment is the preservation of the property, or of its rents and profits, from waste and destruction, while the ulterior objects had in view are those contemplated by the suit itself. And if plaintiff ultimately succeeds in establishing his title to the entire property, the appointment may be regarded as having been entirely for his benefit.[2] And it would seem that the appointment of a receiver does not so alter the possession of the estate in controversy, in the person who shall ultimately be adjudged entitled thereto at the time of the appointment, as to prevent the operation of the statute of limitations during the controversy.[3]

§ 557. It has already been intimated, that equity is extremely averse to any interference with the possession of real property, by a defendant claiming under a legal title. And it may be laid down as a general proposition, supported by an overwhelming array of authority, both in England and in America, that courts of equity proceed with extreme caution in granting receivers as against a defendant in pos-

[1] Pfeltz v. Pfeltz, 14 Md., 376.

[2] Chase's Case, 1 Bland, 206.

[3] Anonymous, 2 Atk., 15.

session, and will rarely interfere with such possession by appointing a receiver *in limine*, upon a mere legal title asserted by plaintiff. And whenever the contest is simply a question of disputed title to the property, plaintiff asserting a legal title in himself, against a defendant in possession and receiving rents and profits under claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. And while, as will hereafter be shown, there are special circumstances of fraud or of imminent danger of loss or of irreparable injury, which may sometimes warrant a departure from the general rule, yet in the absence of any such controlling circumstances, the courts insist upon its rigid enforcement, and refuse to deprive a defendant of his possession, under claim of title, until plaintiff's right is established at law.[1] A departure from the rule can only be justified upon strong grounds of judicial necessity, or in case of fraud clearly proven, or of imminent danger unless immediate possession is taken by the court.[2] And the burden rests upon complainant to make out a clear case to justify the relief, and the court should be reasonably satisfied that he will finally recover and that the benefit of such recovery will be lost to

[1] Lloyd *v.* Passingham, 16 Ves., 59; S. C., 3 Meriv., 697; Mordaunt *v.* Hooper, Amb., 311; Owen *v.* Homan, 3 Mac. & G., 378, affirmed by the House of Lords, 4 H. L. Rep., 997; Bainbrigge *v.* Baddeley, 3 Mac. & G., 413; Talbot *v.* Hope Scott, 4 Kay & J., 96; Lancashire *v.* Lancashire, 9 Beav., 120; Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162; Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515; Parkin *v.* Seddons, L. R., 16 Eq., 34; Vause *v.* Woods, 46 Miss., 120; Schlecht's Appeal, 60 Pa. St., 172; Willis *v.* Corlies, 2 Edw. Ch., 281; Gregory *v.* Gregory, 33 N. Y. Supr. Ct. R., 1; Clark *v.* Ridgely, 1 Md. Ch., 70; Chicago & Allegheny Oil & Mining Co. *v.* U. S. Petroleum Co., 57 Pa. St., 83; S. C., 6 Phila., 521; Cofer *v.* Echerson, 6 Iowa, 502; Emerson and Wall's Appeal, 95 Pa. St., 258; De Walt *v.* Kinard, 19 S. C., 286; Rollins *v.* Henry, 77 N. C., 467; Twitty *v.* Logan, 80 N. C., 69.

[2] Lloyd *v.* Passingham, 16 Ves., 59. And see S. C., 3 Meriv., 697, where a subsequent application for a receiver was also refused.

him without a receiver before it will interfere; and an affidavit upon information and belief is not sufficient ground for interposing.[1] Nor will defendant be deprived of his possession by a receiver, unless it is made to appear that there is great risk of ultimate loss to the property, and of insolvency on the part of defendant, so that he will be unable to respond to a final decree.[2] And in the absence of fraud, or of any privity between the parties, or of any equities touching the conscience of defendants in possession, equity invariably refuses to extend the aid of a receiver, until plaintiff has established his title at law.[3]

[1] Davis *v.* Reaves, 2 Lea, 649.

[2] Vause *v.* Woods, 46 Miss., 120.

[3] Talbot *v.* Hope Scott, 4 Kay & J., 96, a leading case, in which the English authorities are carefully reviewed. Vice-Chancellor Wood observes, p. 111: "With regard to the first part of the relief prayed by the bill, namely, the receiver, which is really the substantial part of the case, I apprehend that, as to the settled estates, it is too clear for any contention at the present day, that this court will not interfere at the instance of a person alleging a merely legal title in himself against other persons in possession of the estates, to grant a receiver and put them out of possession. In Lord Fingal *v.* Blake, 2 Moll., 78, and in the subsequent case of Lloyd *v.* Lord Trimleston, id., 81, there are some observations of Sir A. Hart, which seem to have a leaning in favor of such interference, and to which I shall refer presently; but there is no decision which in the least bears out the proposition that the court will interfere under such circumstances, for it is manifest that, in the first of these cases, the receiver was granted by consent. That there may be a possible case in which this court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if no steps were taken, I can understand; but I have found nothing that bears any resemblance to the doctrine contended for, that at the instance of a person alleging a mere legal title, this court will interfere against another who is in possession, to deprive him of that possession. I have known, and everybody must have known, numerous instances where ejectment has been brought for very valuable property, upon a merely legal title; yet I think I may say that, for the last twenty years, if not for longer, no one has ever dreamt of approaching this court, however heavy the litigation between the parties, for the purpose of obtaining a receiver, until he had established his right at law to possession of the estates. The ground of the rule adopted by the court, in this respect, I conceive to be extremely sound; the general ground being that the court can not interfere with a legal title of any description, unless there be

§ 558. The grounds of the exceptions to the general rule, as above stated, will be found, upon examination, to resolve themselves into two general conditions, both of which must combine to warrant a court of equity in granting a receiver as against a defendant in possession. These conditions are, first, that plaintiff must show a strong ground of title, with a reasonable probability that he will ultimately prevail; and second, that there is imminent danger to the property, or to its rents and profits, unless the court shall interpose.[1] Especial importance is attached by the courts to the first of the conditions here named, and when the parties are litigating the right to real property, and the litigation depends upon questions to be decided at law, defendant being in possession and standing on his legal title, it is regarded as an indispensable condition to the exercise of the jurisdiction of equity by a receiver, that a reasonable probability be shown to the court that the parties claiming to disturb the possession will ultimately establish their title to the property.[2] And when this question is involved in much obscu-

some equity by which it can affect the conscience of the defendant. Where there is an entire want of privity between the plaintiff and the defendant, and the defendant is simply a wrong-doer at law, this court does not take upon itself to interpose, unless in very exceptional cases."

[1] Mordaunt *v.* Hooper, Amb., 311; Bainbrigge *v.* Baddeley, 3 Mac. & G., 414. See, also, Mayo *v.* McPhaul, 71 Ga., 758. In Mordaunt *v.* Hooper, Amb., 311, Lord Hardwicke stated that a motion for a receiver was very uncommon where the matters in dispute depended on a mere legal title, although a case might be so circumstanced as to induce the court to grant it. And both the grounds stated in the text being fully made out by affidavit and by defendant's answer, a receiver was allowed. But the reporter adds, that "it was a very strong case, and almost all the facts insisted on by defendant in his answer were denied by affidavits."

[2] Bainbrigge *v.* Baddeley, 3 Mac. & G., 414. See, also, Cofer *v.* Echerson, 6 Iowa, 502; Gregory *v.* Gregory, 33 N. Y. Supr. Ct. R., 1. Bainbrigge *v.* Baddeley, 3 Mac. & G., 414, was an action to set aside a will, under which defendant claimed title to, and was in possession of, the property in dispute. The Master of the Rolls having appointed a receiver of the property upon the application of plaintiff, the order was discharged on motion before the Lord Chancellor. Lord Truro observes, p. 417: "It is ad-

rity, and is dependent upon the construction of deeds, which is attended with doubt and difficulty, the court may properly refuse to interfere.[1]

§ 559. As illustrating the general doctrine already stated,

mitted that, if the will of 1818, under which the defendant claims, can be substantiated as a valid will, the plaintiff has no case. The validity of the will is a question which, from its nature, must be decided at law. . . Now, it appears to me that the jurisdiction of the court to grant a receiver can not be denied, nor do I understand it to be denied. There are few cases that can be stated in which the court has not jurisdiction when it is essential to the justice of the case to interfere to preserve the property for the party entitled. But that jurisdiction is governed by circumstances applicable to the different stages of proceedings, and to different cases; but when the parties are litigating the right to property, and the litigation depends upon questions then to be decided at law, what are the circumstances in which the jurisdiction is to be exercised and is properly applicable in granting a receiver? There are, I apprehend, two grounds, and two only; first, that there is a reasonable probability of success on the part of the plaintiff; and secondly, that the property, the subject of the suit, is in danger. This motion, however, is made against a party who is in possession; that possession is not shown to have been obtained by violence or by wrong, using the word 'wrong' in the sense of being without color of title, but under the sanction of the court. What, under such circumstances, is it proper for me to presume? What is the *prima facie* case, as far as concerns his title? Am I warranted in presuming that the will under which he claims is bad or good? I apprehend I ought to presume, until I have the case so before me as to enable me judicially to form an opinion upon the subject, that the will is good. This court ought not, in any case, to disturb the possession of a party who stands upon his legal title, without a reasonable probability that the plaintiff will ultimately succeed. I consider, therefore, that one indispensable ground for the exercise of the jurisdiction is the reasonable probability shown to the court that the parties claiming to disturb the possession will ultimately establish a title to it. I do not see any such reasonable probability here; not at all using that expression to prejudice the plaintiff's title, or to express any opinion upon it. His case may be the strongest that ever was presented; it may, when it comes to be laid before the proper tribunal, entitle him to a verdict without any doubt or hesitation; but I have not the materials before me to warrant me in coming to that conclusion."

[1] Owen *v.* Homan, 3 Mac. & G., 378, affirmed on appeal to the House of Lords, 4 H. L. Rep., 997. See, also, Cofer *v.* Echerson, 6 Iowa, 502.

it is held that where the defendant is in possession, having the legal estate, without fraud, and also claims to be the equitable owner, there being a doubt as to the question of right between the parties, and no danger alleged or shown as to the rents and profits, the court will refuse a receiver.[1] So where the contest before the court is merely as to the right of possession, and plaintiffs show no peculiar circumstances or immediate danger to the property, requiring the intervention of a receiver, the only ground relied upon being the alleged insolvency of defendant in possession, equity will not interfere, especially if there is doubt as to plaintiff's right to recover.[2]

§ 560. While the probability that plaintiff will ultimately succeed in establishing his title is an important element in determining whether a receiver shall be allowed as against a defendant in possession, yet such probability is not of itself sufficient ground for interfering, when defendant's possession has been acquiesced in for a long series of years, and no danger to the property is shown from a continuance of such possession.[3] And when the property in controversy has been held and managed and its proceeds have been applied by a corporation, in a particular manner and for a long period of years, equity will not disturb such possession by a receiver and an injunction, upon the ground that such application is a breach of trust, unless the court is perfectly satisfied that defendant in possession is a mere naked trustee, without any right or discretion in the management of the property.[4]

§ 561. It has already been shown that equity will not disturb the possession of a defendant holding under claim of legal title, by appointing a receiver when adequate redress may be had at law. In accordance with this principle, it is held where plaintiff shows no probable cause for his

[1] Lancashire *v.* Lancashire, 9 Beav., 120.

[2] Cofer *v.* Echerson, 6 Iowa, 502.

[3] Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515.

[4] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162.

ultimate recovery, and where it is apparent that the filing of a notice of *lis pendens*, in accordance with the practice of the state, will operate effectually to prevent a transfer of the lands in controversy *pendente lite*, and will protect plaintiff's equitable interest therein, if any, that a receiver will not be granted.[1]

§ 562. The general rule already stated, denying the aid of a receiver in a contest as to title as against a defendant in possession, is applicable to the case of a lessor and lessee of real estate, and equity rarely interferes with the lessee's possession by granting a receiver. The lessee being clothed with title and possession under his lease, and being in the enjoyment of rights apparently legal, will not be deprived of his possession by a receiver, unless under very urgent and peculiar circumstances. And to entitle him to relief in such a case, the plaintiff or lessor must show a clear right, with such attending circumstances of danger or of probable loss as will move the conscience of a chancellor. Thus, in the case of a lease of certain premises, conferring upon the lessee the right to bore for and take oil therefrom, the lessee returning as rent one-fourth of the product to the lessor, in an action by the latter in equity for an accounting and an injunction against the lessee, in aid of an action at law for the forfeiture of the lease, equity will refuse an injunction and a receiver of the lessee's portion of the proceeds.[2] But

[1] Gregory *v.* Gregory, 33 N. Y. Supr. Ct. R., 1.

[2] Chicago & Allegheny Oil & Mining Co. *v.* The United States Petroleum Co., 57 Pa. St., 83; S. C., 6 Phila., 521. The court, Agnew, J., say, in the case as reported in 57 Pa. St., at p. 89: "The original bill, in this case, prayed for a decree of forfeiture of the lease held by the defendants, and for the appointment of a receiver for the lessee's share of the oil. The amended bill avers breaches of the covenant in the lease, and a forfeiture thereby; states that an action at law has been brought to enforce the forfeiture, and that this bill is in aid thereof; and then prays for an account of all the oil, and for the appointment of a receiver as before, and in the meantime that the defendants shall be restrained from taking and disposing of any oil obtained upon the land. The prayer for an account being withdrawn, the relief prayed for is the appointment of a receiver of the defend-

in an action by a lessor against lessees for the recovery of possession after the expiration of the term, the title being in plaintiff and possession being wrongfully withheld by defendants, who are insolvent, a receiver may properly be appointed.[1]

§ 563. Upon an application for a receiver to take charge of real estate and receive the rents and profits, pending a litigation as to the right of conflicting claimants, a vital point of inquiry, as already indicated, is, as to whether there is danger to the property by suffering it to remain in possession of the party controlling it. Or, in other words, are

ants' portion of the oil, and an injunction to restrain the defendants in the meantime, that is, until the suit at law is determined. . . What, then, are we called upon to do? Simply to appoint a receiver to take into custody and to deprive the lessee of his share of the product until the plaintiffs can see whether they will be successful in obtaining a judgment of forfeiture in a doubtful case. No receiver is asked for the landlord's portion, and plainly because as to it the purpose is to require delivery without interruption. The actual purpose is to take into custody that which will be mesne profits in the event of establishing the forfeiture. Look at the case in any direction, and all that is in it is to obtain our assistance in giving effect to an alleged forfeiture, and to restrain the defendants from the exercise of their legal rights under the lease, while the plaintiffs are engaged in experimenting at law for the forfeiture. It is not for the protection of a clear and well defined right, and to prevent an irremediable injury which may ensue if we do not intervene, nor is it the ordinary case of one who shows an equitable right in the subject of custody, and asks the court to interfere for its security until the termination of litigation. The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtingly. Where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such a case, or a *prima facie*, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. Finding no such elements in this case, the bill is dismissed, and the costs ordered to be paid by the plaintiffs."

[1] Nesbitt *v.* Turrentine, 83 N. C., 535.

there any special circumstances rendering it necessary for the better preservation of the property, *pendente lite*, that it should be taken under custody of the court. And when no such circumstances are shown, the court will not exercise its summary jurisdiction by a receiver. For example, where an unincorporated religious society holds certain real estate, the legal title to which is vested in trustees for the use of the society, and a dissension occurs resulting in the withdrawal of one portion of the society from the other, and the members withdrawing claim to hold the original faith of the society and to be entitled to the realty, upon a bill filed by them to establish their right to the property as against the trustees in possession, a receiver will not be granted when there is neither proof nor allegation before the court of danger to the property from waste or destruction by defendants, and no apprehension of injury in consequence of the property remaining in their possession, or under their control, pending the litigation.[1]

[1] Willis *v.* Corlies, 2 Edw. Ch., 281. McCoun, Vice-Chancellor, says, p. 286: "The defendants, as trustees and as such committee, have the present possession, and assume the exercise of rights in those capacities. Believing themselves to be the rightful trustees and managers, they take care to preserve the property as their own; and there is neither proof nor allegation before me of the danger to it from acts of waste or destruction by defendants, or any apprehension of injury in consequence of the property being in their possession or under their control pending the litigation. Nor is it alleged that the defendants are irresponsible men, and unable to make good the loss of rents to the complainants, if they, the defendants, should be decreed to account for rents which they may in the meantime receive. Under circumstances like these, it appears unnecessary to appoint a receiver, nor would such appointment be consistent with the principles by which this court is governed. . . After all, it comes back to the only inquiry which I apprehend can be made in this stage of the cause: is there danger to the property? In other words, is there evidence of fraud in obtaining the possession, or any special circumstance to render it necessary for the preservation of the property *pendente lite*, or proper in the exercise of a sound discretion for the interference of the court in this summary manner? As there is scarcely a color of pretense for this application on any of the above grounds, I must refuse it with costs."

§ 564. While courts of equity, as is thus shown, are extremely averse to interfering by a receiver with the possession of real property held by defendants under a claim of legal title, and will not ordinarily interpose unless there be some clear equity affecting the conscience of the party in possession, yet when the property is actually in possession of the court by its receivers, and a proposition is pending for a compromise and a division of the property between the different claimants, it is proper for the court to continue its custody of the property already assumed, until the rights of the parties can be adjusted. The question presented, in such case, is not the creation but the continuance of the receivership, and the burden falls, not upon the applicant to continue, but upon those who seek to rescind the action of the court. It is proper, therefore, under such circumstances, to continue the receiver until further order.[1]

[1] State *v.* Allen, 1 Tenn. Ch., 512. The distinction is clearly stated by Cooper, Chancellor, as follows, p. 514: "If this application was to have a receiver for the first time upon property in possession of the defendants under an adverse claim as heirs and devisees of W. P. Downs, I should probably refuse it. The court is very slow to appoint a receiver of realty in the peaceable possession of defendants under a claim of right, and when the contest is between claimants of the legal title. For the court can not interfere with the legal title, unless there be some equity by which it can affect the conscience of the party in possession. And such interference is, to a certain extent, giving relief, and upon a preliminary motion, depriving the defendant of a present use and enjoyment of the estate, and *pro tanto* and *pro tempore*, giving a decision against him. The property was not, however, at the filing of this bill, in the peaceable possession of the defendants. On the contrary, it was in the custody of this court, by its receivers, at the instance of several of these defendants setting up adverse claims to each other. If now, in this attitude of affairs, the claimants choose, in view of a claim hostile to all of them, to agree upon a division of the property among themselves by a compromise, and not by a judicial decision of their respective rights, the question of the appointment of a receiver could scarcely be said to turn upon peaceable possession under a legal title. The previous litigation and the previous receiverships demonstrate that no one of the claimants is yet in peaceably under legal right. The very fact that each of these claimants has been able, as against the other, to have a receiver appointed, proves the existence of some equity to affect the

§ 565. Having thus considered the general doctrine of courts of equity, denying the aid of a receiver as against a defendant in possession, in a contest concerning the legal title, it remains to examine those cases where a departure from the rule has been allowed, upon grounds of a purely equitable nature, appealing strongly to the conscience of a chancellor. The element of fraud in obtaining possession by defendant has been treated by the courts as an important feature in cases where a departure from the general rule has been sanctioned. And where it is sought to annul a conveyance of real estate made by plaintiff, upon the ground of fraud and undue influence in obtaining the conveyance, if upon bill and answer there is a strong probability of plaintiff maintaining his cause and ultimately obtaining the relief sought, a receiver may be appointed in the first instance.[1] And where, in such an action, the bill

conscience of each, and authorizes the appointment of a receiver, not to deprive them of a previous legal possession, but to continue the custody already assumed by the court until the rights of the parties can be adjudicated. The question is not the creation but the continuance of the receivership; not the deprivation of an existing right, but the prevention of the acquiring a new right, it may be by collusion. The burden is not upon the applicant to continue, but upon those who seek to rescind the receivership. The present receiver will be continued until further order."

[1] Huguenin *v.* Baseley, 13 Ves., 105; Stitwell *v.* Williams, 6 Madd., 49, 1st American Edition, 38, affirmed by the Lord Chancellor, *sub nom.* Stilwell *v.* Wilkins, Jac., 280. In Huguenin *v.* Baseley, 13 Ves., 105, Lord Erskine observes, p. 106: "Two distinct questions arise: 1st, whether so strong a probability of title appears upon this bill and answer, as will induce the court, upon the principles on which it acts, to consider this plaintiff as having a strong interest to have the estate secured, in case she should obtain a decree; 2dly, whether this defendant, having the legal estate by adverse title, not being a trustee by his admission, a receiver ought to be appointed by interlocutory order on motion. . . I admit, I am not in this way to decide or prejudice this cause. All that it is necessary to say is, that there is a very strong probable title in the plaintiff to call back this estate, upon such terms as may seem proper at the hearing, which she appears to have conveyed under such circumstances, reserving only an interest for life. The question then is, whether, whatever may be my opinion of the complexion of this case upon the bill and answer, I ought to interfere by appointing a

shows that the grantor was a person of weak intellect; young and inexperienced, of constant habits of intoxication, and ignorant of the real value of the property conveyed; that the consideration paid was grossly inadequate to the value of the property, and that he was persuaded to execute the deeds under the impression that he was conveying only a life estate, an appropriate case is presented for a receiver, when the answers of defendants in possession merely allege their ignorance of the facts charged in the bill, without denying those facts.[1] So the relief has been granted in an action to set aside a conveyance alleged to have been procured by fraud and undue influence exercised over the grantor, a person of weak intellect, and the grantee being insolvent aside from the property in question.[2]

§ 566. When plaintiff shows an equitable title to a part

receiver. A very strong case has been produced in favor of that. In Vann *v.* Barnett, 2 Bro. C. C., 158, the defendant had the legal estate in trust to pay himself. But, as one of the ruling principles of this court is that there must be some evil actually existing, or some evidence of danger to the property if the court should not interfere, to induce it to act in this stage of a cause, as in the instance of waste, though I have a strong inclination to grant a receiver, I will look into the authorities before I determine." Upon a subsequent day Lord Erskine observed: "Under all the circumstances of the case, I have no doubt of the jurisdiction to appoint a receiver. But, in order to avoid the expense of that, the plaintiff being entitled for her life to an annuity, admitted to be very near, if not quite, equal to the rents, I propose an inquiry what arrears of the annuity are due; the defendant to pay the amount forthwith, to give security for the future payments, and to account for the rents and profits." The order was drawn up accordingly.

[1] Stilwell *v.* Wilkins, Jac., 280, affirming S. C., *sub nom.* Stitwell *v.* Williams, 6 Madd., 49, 1st American Edition, 38. In the case as reported in Jac., 280, Lord Eldon says, p. 283: "I am ready to admit that I do not remember any instance of a receiver being so appointed, but still the question is, whether there may not be a case where it ought to be done. If the case stated be true, and it is more than probable that it is true, the inadequacy was so monstrous, the situation of the young man and the state of his intellect were such, that it is hardly possible to suppose that the transaction can stand; and I think, therefore, that this is a case where such an order may be made, though it is not the general habit of the court."

[2] Mitchell *v.* Barnes, 22 Hun, 194.

of the property in controversy, and a legal and equitable title to the remainder, and defendant shows no title, either legal or equitable, a receiver may be appointed pending the litigation. And an additional ground for the relief is presented, in such case, when it appears that the interference of equity may prevent vexatious litigation, there being a great number of tenants of the property, and a probability of prolonged litigation, unless the matter is determined by a court of equity.[1] So an abuse of trust by the party in possession, by which the safety of the property is endangered, coupled with his insolvency and consequent insecurity of the rents and the profits, will warrant the court in extending the aid of a receiver.[2]

§ 567. It was the doctrine of the English Court of Chancery, that upon a bill by creditors claiming satisfaction against both the real and personal estate of the debtor, if it appeared probable from defendant's answer that there was no personal estate, and that both the realty in defendant's possession and the rents and profits thereof must become responsible for the demands, the court might appoint a receiver in the first instance, although the power was recognized as a delicate one.[3] But when an incumbrancer seeks the aid of equity by a receiver over defendant's real estate, and there are judgment creditors of the defendant in possession, the appointment will be made without prejudice to the rights of such creditors.[4] And in the Irish Court of Chancery, the doctrine is held that the court has full jurisdiction to grant a receiver, even against a defendant in possession of real property, in an action for the recovery of lands, when plaintiff shows a probable title and danger of the rents being lost.[5] But the relief will not be granted to the owners of real estate merely because of the difficulty of collecting rents from their tenants.[6]

[1] Cole *v.* O'Neill, 3 Md. Ch., 174.
[2] Chase's Case, 1 Bland, 213.
[3] Jones *v.* Pugh, 8 Ves., 71.
[4] Davis *v.* Duke of Marlborough, 1 Swans., 74.
[5] Scott *v.* Scott, 13 Ir. Eq., 212.
[6] *In re* Madden, 3 L. R., Ir., 172.

§ 568. The aid of equity by a receiver is sometimes invoked for the protection of dower interests in the estate of a deceased husband. And in a proceeding by a widow to have her dower set aside, if it is shown that the property is in possession of and controlled by a person who is insolvent, and who has taken the benefit of the state insolvent laws pending the litigation, and that the rents and profits are exposed to imminent danger or to inevitable loss, a receiver may be allowed.[1] But upon a bill by an heir-at-law and devisee of a deceased person to determine the widow's dower, in order to warrant an injunction against the disposal of the property, and a receiver of the rents and profits, it is not sufficient merely to allege that the rents are in jeopardy, but it must be shown how they are jeopardized. And when there is no allegation that the rents and profits of the real estate, which is supposed to be subject to the dower interest, will be lost by reason of insolvency of those receiving them, or that plaintiff has not an adequate remedy at law for such of the rents as he may be entitled to, a receiver should not be granted.[2]

§ 569. The jurisdiction of equity by the appointment of a receiver is sometimes invoked for the protection of heirs or devisees, or for the enforcement of trusts created by the ancestor's will. And upon a bill by children of a testator to establish his will, and to enforce the performance of certain trusts in favor of plaintiffs upon which the testator devised his property, and for an account of rents and profits, a receiver has been allowed of the rents and profits, when it was manifest that the testator's intentions had been disregarded.[3] And a receiver has been granted upon a bill filed by parties interested in the execution of the trusts of a will, alleging that rents had not been collected, and that incumbrancers were threatening to take possession of the estate or otherwise proceed for the recovery of their mortgage

[1] Chase's Case, 1 Bland, 206.

[2] Knighton *v.* Young, 22 Md., 359.

[3] Podmore *v.* Gunning, 5 Sim., 485.

debts, unless a receiver should be appointed.[1] Where, however, the heir-at-law is in possession, equity will not ordinarily grant a receiver in an action to carry into execution the trusts of the will of a deceased testator, until the will has been proven, when it is not admitted by answer, since the court will not displace the possession of the heir-at-law until his title has been displaced.[2] But it has been held, where the heir-at-law, disputing the will of his ancestor, enters into possession of the devised estates, and a court of equity directs an issue to be tried at law as to the validity of the will, *devisavit vel non*, upon a bill by the executors against the heir to establish the will, that the court may properly appoint a receiver against the heir in possession, and may enjoin him from committing waste.[3] But a legatee under a will, whose legacy is a charge upon the estate of the testator, subject to prior mortgages and other charges, is not entitled to a receiver over the estate, because the rents and proceeds are being applied to keep down the interest on such charges.[4]

§ 570. As between the heir-at-law and a devisee under the will of the ancestor, pending litigation concerning the relative rights of the parties, equity does not interfere as of course by appointing a receiver of the estate against a devisee in possession; and in the absence of any special circumstances of mismanagement or danger to the estate, a receiver will be refused, and the parties will be left to pursue their remedy at law.[5] In such cases, the court proceeds upon the principle that the heir, if he recovers at all, must recover upon the strength of his title at law, and the possession of the devisee under the will is regarded as a lawful possession, which the court will not disturb by a receiver.[6] Nor will a receiver be granted upon the application of one

[1] Hart *v.* Tulk, 6 Hare, 611.

[2] Dobbin *v.* Adams, 8 Ir. Eq., 157.

[3] Fingal *v.* Blake, 1 Mol., 113.

[4] Faulkner *v.* Daniel, 3 Hare, 204, note.

[5] Schlecht's Appeal, 60 Pa. St., 172; Knight *v.* Duplessis, 1 Ves., 324. See S. C., 2 Ves., 360.

[6] Knight *v.* Duplessis, 2 Ves., 360.

claiming as a devisee under a will, upon a bill against other devisees and an heir-at-law to establish the will and enforce its trusts, when its validity is disputed and it is not shown that the property is exposed to any danger by remaining in possession of defendants.[1] But as between an heir-at-law in possession and a devisee under the will of the ancestor, which is being contested by the heir, equity may interpose for the protection of the devisee in a strong case, by granting a receiver of the rents and proceeds, when the court is satisfied that the heir is entirely shut out from inheriting by the terms of the will. But such a state of facts is not to be regarded as affecting the right of an heir from whom the testator has not taken away the legal estate.[2] And when, in such a case, the heir-at-law has obtained a verdict against the will, he will be regarded as entitled to possession of the estate, and equity will refuse to disturb his possession by appointing a receiver in behalf of a devisee under the will, notwithstanding a new trial has been directed in the action to test the validity of the will.[3]

§ 571. When a conveyance of real estate is made in trust for the benefit of the grantor's wife during her life, with remainder to his children equally to receive the rents and profits for life, and after the wife's death the grantor takes possession and appropriates the rents and profits to his own use, no sufficient ground is presented for a receiver, when it is not shown that the person alleged to be in wrongful possession is insolvent, or that the rents and profits are in danger of being lost to the heirs.[4] Nor is it sufficient ground for appointing a receiver over the estate of a deceased person, upon a bill by the next of kin, that the defendants, pretending to be heirs of the deceased, are opposing plaintiff's application for letters of administration, when the bill states no grounds of opposition on the part of defendants, and nothing appears to show that plaintiff may not in due course obtain the administration.

[1] Clark *v.* Dew, 1 Russ. & M., 103.
[2] Fingal *v.* Blake, 2 Mol., 50.
[3] Lloyd *v.* Trimleston, 2 Mol., 81.
[4] Clark *v.* Ridgely, 1 Md. Ch., 70.

A demurrer, therefore, to such a bill for want of equity will be sustained.[1]

§ 572. Where plaintiffs were entitled, as younger children of a deceased ancestor, to certain portions allowed them in the settlement of his estate, raised out of a term of years, and had obtained a decree for a sale of the term for that purpose, but the tenant for life obstructed the enforcement of the decree, a receiver of the rents and profits was allowed as against the tenant for life.[2] And where the holder of the life estate rented the premises, and, after her death, the tenant continued in possession, claiming to own the premises as heir, upon a bill against the tenant for an accounting and payment of the rents accruing after the death of the owner of the life estate, and for a receiver, the case was regarded as an appropriate one for the relief, and a reference was made to a master to appoint a receiver.[3]

§ 573. The owner of land, who has contracted for its sale, and executed a bond for title, conditioned upon the payment of vendee's notes for the purchase money, can not, on the ground of vendee's insolvency and commission of waste, obtain a receiver to hold the property pending an action to rescind the contract; since, however imprudent the contract of sale may have been, the vendor can not, because of his own imprudence, obtain such relief, and must be left to pursue his remedy at law.[4]

[1] Jones *v.* Frost, 3 Madd., 1st American Edition, 9.

[2] Brigstocke *v.* Mansel, 3 Madd., 1st American Edition, 32.

[3] Anonymous, Amb., 311, note 1.

[4] Jordan *v.* Beal, 51 Ga., 602. The court, Trippe, J., say, p. 601: "All questions were eliminated from the case at the hearing by the answer of defendants and the suppletory affidavits, but one. That question is, can the vendee of lands, who sells and gives a bond for title to an insolvent vendor, one who has no property, and so known to the vendor, on the ground of that insolvency, simply, ask for the appointment of a receiver who shall hold the property until a decree can be had canceling the contract of sale? There was no fraud charged. The charge as to waste, etc., was denied by the answer and by affidavits. No authority was referred to showing that such a remedy exists, and we can see much danger and unlimited trouble that would be given to the courts

§ 574. The aid of equity by a receiver is sometimes extended in behalf of annuitants, or creditors whose demands are an annual charge upon the real estate of their debtor, the effect of such appointment being virtually to attach the rents due from tenants of the premises on which the annuity is charged.[1] And upon a bill for an accounting of arrears of an annuity charged upon defendant's real estate, equity may grant a receiver *in limine*, to take charge of the rents until the rights of the parties can be finally ascertained, when it is shown that the annuity is in arrears, and the premises are an insufficient security.[2] So when an annuity is a charge upon the benefice of a clergyman, in the nature of an equitable mortgage, the annuitant is entitled to a receiver of the income from the benefice, in preference to later judgment creditors.[3] And where plaintiff claimed an annuity which defendant had by deed charged upon certain of his property by name, and generally upon all other of his property, and plaintiff, upon a bill to raise the arrears of his annuity, had obtained a receiver over a portion of defendant's premises, the value of which

if the principle contended for were a correct one. The owner of property thus selling it does so with his eyes open. He takes the risk. He reserves the title as security. His lien is higher than any other. A specific remedy is given him by statute: Code, secs. 3684, 3886. No fraud in the contract is practiced upon him. He has simply made an imprudent bargain, or comes to the conclusion he has, as his debtor, the purchaser, does not pay him at the time agreed on, and then asks a court of equity to take the land at once out of the possession of the purchaser and hold it for him until he can have a decree to set aside the whole bargain, and then to give him back his land. If this were the rule, or if a holding were made, as is invoked by complainants, under the facts as they appeared at the hearing before the chancellor, every vendor of land who makes a rash or imprudent sale would at once seek the remedy, and there would be a harvest of suits for relief from one's own improvidence or error. This would work a greater evil than is the hardship of waiting six months on a suit at law and a sale as provided by law."

[1] Hayden *v.* Shearman, 2 Ir. Ch., N. S., 137; Beamish *v.* Austen, Ir. Rep., 9 Eq., 361.

[2] Kelly *v.* Butler, 1 Ir. Eq., 435.

[3] Battersby *v.* Homan, 2 Ir. Ch., N. S., 232.

was insufficient to satisfy the annuity, and plaintiff subsequently discovered other property belonging to defendant, the receiver was extended to such other property.[1] But, in conformity with the general principle denying the aid of a receiver when the party aggrieved has an adequate remedy at law, an annuitant, whose annuity is a charge upon real property, will not be allowed a receiver because his annuity is in arrears, if he has the power of distraining upon the land; since the remedy by distraint is ample, and equity will not grant a receiver in behalf of one who does not need such aid.[2] And when a testator has by his will charged an annuity upon real property, a court of equity will not, pending a controversy as to the validity of the will, appoint a receiver in behalf of the annuitant, while there appear to be prior charges and incumbrances upon the property, which, in the event of the will being declared valid, must be first paid out of the property.[3] But if an annuity charged upon real property is in arrears, and there is doubt as to the remedy at law, a receiver may be appointed, the jurisdiction in equity, in such cases, being regarded as concurrent with the jurisdiction at law.[4] And upon a bill by a father against his children to set aside conveyances to the latter, upon the ground that they were fraudulently obtained, and that defendants had refused to pay the father an annuity charged upon the premises conveyed, the case was regarded as a proper one for a receiver, unless defendants would, without delay, pay the amount of the annuity.[5]

§ 575. As regards the appointment of receivers in aid of actions of ejectment, or suits for the recovery of real property, there is some apparent conflict in the decisions of the courts, which can only be harmonized by keeping in view

[1] Lyne *v.* Lockwood, 2 Mol., 498. But in this case, a reference was ordered to a master, to report whether any other creditors were entitled to priority.

[2] Sollory *v.* Leaver, L. R., 9 Eq., 22.

[3] D'Alton *v.* Trimleston, 2 Dr. & War., 531.

[4] Beamish *v.* Austen, Ir. Rep., 9 Eq., 361.

[5] Probasco *v.* Probasco, 30 N. J. Eq., 108.

the general principles already established as governing applications for receivers over real property *pendente lite.* The better doctrine undoubtedly is, that in ordinary actions of ejectment, or suits for the recovery of real property in the nature of ejectment at common law, when no especial equities interfere in favor of plaintiff, the contest being merely as to the legal title of the premises in dispute, a receiver of the rents and profits will not usually be appointed *pendente lite.* Unless, therefore, some equitable grounds are made to appear, entitling plaintiff to the rents and profits as such, or unless it is shown that their sequestration is essential to his protection, equity will refuse to lend its aid by a receiver, since the interference would, in effect, amount to a complete ouster of the defendant, by taking away from him the subject-matter of the litigation, without trial or judgment.[1] And in such case, a valid legal title in the plaintiff is not of itself a sufficient ground for the relief.[2]

§ 576. Where, however, the plaintiff, in an action for the recovery of real estate, shows an apparently good title, and, in addition thereto, that there is imminent danger of loss of rents and profits because of the mismanagement and insolvency of defendant in possession, a different case is presented, and a receiver may be granted for the better preservation of the rents and profits *pendente lite.*[3] And where, pending his action of ejectment, plaintiff files a bill showing a good

[1] People *v.* Mayor of New York, Supreme Court, General Term, 10 Ab. Pr., 111, reversing S. C., Supreme Court, Special Term, 8 Ab. Pr., 7; Thompson *v.* Sherrard, 35 Barb., 593; S. C., 22 How. Pr., 155; Corey *v.* Long, 12 Ab. Pr., N. S., 427; Rollins *v.* Henry, 77 N. C., 467; Mapes *v.* Scott, 4 Bradw., 268. And see to the same effect, under the code of civil procedure in California, Bateman *v.* Superior Court, 54 Cal., 285. As to the right to a receiver of the rents and profits of real property, pending an action of ejectment, under the statutes of North Carolina, see Kron *v.* Dennis, 90 N. C., 327.

[2] People *v.* Mayor of New York, Supreme Court, General Term, 10 Ab. Pr., 111, reversing S. C., Supreme Court, Special Term, 8 Ab. Pr., 7.

[3] Payne *v.* Atterbury, Harring. (Mich.), 414; Ireland *v.* Nichols, 37 How. Pr., 222; S. C., 1 Sweeney, 208. See, also, Rogers *v.* Marshall, 6 Ab. Pr., N. S., 457.

legal title to the premises, which is not successfully controverted by the answer, and it is shown that plaintiff is in great danger of losing the rents and profits, by reason of defendant's negligent and wasteful management, and that the property is depreciating in value and not paying interest on its incumbrances, because of the bad management of defendant, who is himself in insolvent circumstances, a fitting case is presented for the aid of equity by a receiver. In such a case, defendant being regarded as holding over as against his own deed, and not being responsible for mesne profits or permissive waste, by reason of his insolvency, the aid of equity is necessary to protect the holder of the legal title.[1] And in an equitable action to recover real estate, upon the ground that the proceedings by which plaintiff's ancestor had been divested of the title were void for fraud, mistake, and want of jurisdiction in the court in which the proceedings were had, an injunction and a receiver have been allowed when it was shown that defendants in possession were irresponsible and were collecting the rents, and that the premises were in a ruinous condition and would continue to deteriorate if left to defendant's possession pending the litigation, such a case being distinguished from an ordinary action of ejectment.[2] But the appointment of a receiver, in an action to recover possession of real property, is not regarded as a special proceeding or an independent action in itself, but rather as a part of the original action and auxiliary thereto, having no independent existence of its own.[3]

§ 577. After plaintiff, in an action for the recovery of lands, has recovered a verdict and judgment in his favor, his right to a receiver of the rents and profits would seem to be based upon stronger grounds, and there are frequent cases where the relief has been extended under such circumstances, when necessary to preserve the rents and proceeds

[1] Payne *v.* Atterbury, Harring. (Mich.), 414.

[2] Rogers *v.* Marshall, 6 Ab. Pr., N. S., 457.

[3] Whitney *v.* Buckman, 26 Cal., 447.

from loss.[1] Thus, in an action to recover possession of lands on which are located valuable mineral springs, the chief value of the land consisting in the proceeds derived from sales of these waters, after verdict and judgment for plaintiff, and pending a motion for a new trial, it is proper to appoint a receiver upon satisfying the court that the relief is necessary to protect the plaintiff's rights in the property, and that defendant is wasting the waters and otherwise impairing the value of plaintiff's interest therein, and that he is insolvent and unable to respond to a judgment in damages.[2] And when defendants are in possession of land, under a contract for its purchase made with plaintiff's intestate, but fail to make the necessary payments, and plaintiff brings his action and recovers judgment for the return of the land upon payment of a specified sum, upon a bill by plaintiff for an accounting of the rents and profits of the land during defendants' occupancy, the bill alleging that defendants are insolvent, a receiver may be appointed until the determination of the questions involved.[3] So where plaintiff in ejectment recovers judgment in a state court, and defendant obtains a writ of *certiorari* to remove the proceedings to the United States court, and the state court, to prevent a conflict of jurisdiction, suspends execution of the judgment in ejectment, plaintiff is entitled to a receiver of the rents and profits, upon a bill against the administrators of the defendant in ejectment, alleging that they are receiving the rents and profits; that the property is depreciating in value; that there is no judge of the United States court in office, and that the proceedings in *certiorari* are merely a pretense to maintain a harassing litigation for the purpose of keeping possession of the premises and enjoying the rents. Such a state of facts presents a case requiring that the rents and profits shall be held by some indifferent person, under security, until the title can be determined and

[1] Frisbee *v.* Timanus, 12 Fla., 300; Collier *v.* Sapp, 49 Ga., 93; Whitney *v.* Buckman, 26 Cal., 447.

[2] Whitney *v.* Buckman, 26 Cal., 447.

[3] Collier *v.* Sapp, 49 Ga., 93.

the rights of the respective parties adjusted. And the case is regarded as falling within that class of cases in which a court of equity will interpose for the protection of parties when no adequate remedy exists at law.[1]

§ 578. The jurisdiction of equity by the appointment of receivers of the rents and profits accruing from real property is not confined to cases where the estate or interest sought to be protected is the fee simple, but extends also to leasehold interests, over which a receiver may be granted in proper cases. And when a leasehold interest in lands is conveyed to a trustee in trust to secure an indebtedness due to creditors of the lessee or assignor, but such trustee declines to undertake the performance of the trust, a receiver may be appointed in behalf of the creditors to carry into execution the trusts of the deed under the direction of the court.[2] And a receiver may be appointed, before answer, over a leasehold interest of a minor, when there is danger of eviction for non-payment of rents due to the landlord, and when it is manifestly for the minor's benefit that the relief shall be granted.[3] So where one has advanced money, with the consent of the owner of a leasehold, to redeem the lands from eviction under a judgment, he acquires an equitable lien, and may have a receiver for its protection when there is danger of eviction by the landlord for non-payment of rent due.[4] And on a bill against tenant for life, to restrain the disposal of the property and to keep down assessments and taxes thereon, it is proper for the court, on being satisfied that the tenant for life in possession has permitted the taxes to be in arrears, to appoint a temporary receiver of as much of the rents and income as may be necessary to pay off the taxes due and in arrear, unless defendant shall within a specified time pay such taxes.[5]

[1] Frisbee *v.* Timanus, 12 Fla., 300.

[2] Taylor *v.* Emerson, 6 Ir. Eq., 224.

[3] Whitelaw *v.* Sandys, 12 Ir. Eq., 393.

[4] Fetherstone *v.* Mitchell, 9 Ir. Eq., 480.

[5] Cairns *v.* Chabert, 3 Edw. Ch., 312.

§ 579. Notwithstanding the aid of a receiver is thus freely granted for the preservation of leasehold interests, in proper cases, an assignee of the lease is not entitled to a receiver, although entitled to the rents accruing from the demised premises, since he acquires no lien by virtue of the assignment, and has no interest or title in the land sufficient to warrant the aid of equity. Nor is the right of such an assignee to have a receiver strengthened by the fact that he also claims to be the owner of the estate in remainder, since no legal or equitable claim to have the rents sequestered and put into the hands of a receiver can arise from an accidental union of the ownership of the term for years and the estate in remainder in the same person.[1]

§ 580. When the litigation concerns the title to a chattel real, as in the case of a house standing upon leased ground, it is not sufficient cause for putting the property into the hands of a receiver, that the defendants, who are in possession under claim of title, are alleged to be insolvent, and that they have suffered the ground rent to fall greatly in arrear.[2]

§ 581. When a receiver has been appointed over a leasehold interest in lands, on the expiration of the term for which the lands were demised the landlord is at liberty to re-enter into possession without obtaining leave of court for that purpose.[3] But when, in such a case, a motion is made to discharge the receiver as to that portion of the premises

[1] Huerstel *v.* Lorillard, 7 Rob. (N. Y.), 251, affirming S. C., 6 Rob. (N. Y.), 260.

[2] Kipp *v.* Hanna, 2 Bland, 26. Bland, Chancellor, says, p. 31: "A receiver may be appointed against the legal title in a strong case of fraud, combined with danger to the property. In such case, the court may, on affidavits, interfere before the hearing. But the court interposes by appointing a receiver against the legal title with reluctance. It must not only be morally sure that at the hearing the party would upon those circumstances be turned out of possession, but must see some imminent danger to the property and the intermediate rents and profits, from not acting rather prematurely, and if the property should not be taken under the care of the court."

[3] Britton *v.* M'Donnell, 5 Ir. Eq., 275.

the lease of which has expired, defendant in the action should be served with notice of such motion.[1]

§ 582. A court of equity will not, ordinarily, appoint different receivers over the same real estate, the proper course being, where one is already appointed and subsequent applications are made for a receiver over the same estate, to extend the former receiver to the subsequent applications. And on being so extended, he will be required to give additional security, or, in default thereof, he will be removed and another appointment made.[2] And when different receivers have been appointed, on the application of different creditors, over the same estate and property of defendant, the hardship and expense of such a state of facts, as against the owner of the estate, are sufficient grounds to warrant the court in removing all the receivers but one, and extending him over the entire estate.[3] But, while a receiver over real property, appointed for the protection of creditors, is frequently extended in aid of other creditors, this will not be done before answer merely upon consent of defendant, when the effect of thus extending the receiver would be to prejudice rights of the creditors first obtaining a receiver of the rents of the premises.[4]

§ 583. When a receiver over the real property of a defendant debtor is thus extended, for the benefit of other parties claiming an interest in the debtor's estate, the extension, as regards the parties on whose application it is made, is deemed a new appointment, and rents received before the extending order are for the benefit of those only who are entitled to relief in the proceeding in which the receiver was acting when such rents came to his hands. The extending order, therefore, attaches only the rents thereafter received, for the benefit of parties obtaining relief in the proceeding to which the receiver is extended.[5]

[1] Johnston *v.* Henderson, 8 Ir. Eq., 521.

[2] Wise *v.* Ashe, 1 Ir. Eq., 210.

[3] Kelly *v.* Rutledge, 8 Ir. Eq., 228.

[4] Brown *v.* Nolan, 10 Ir. Eq., 57.

[5] Agra & Masterman's Bank *v.* Barry, Ir. Rep., 3 Eq., 443; Lanauze *v.* Belfast, Holywood & Bangor R. Co., id., 454.

§ 584. When real estate has been conveyed to trustees, to hold and manage and receive the rents for the benefit of the *cestui que trust*, a child of the grantor, if disputes and dissensions arise among the trustees as to the management of the property, in consequence of which the rents are not collected, the *cestui que trust* is entitled to a receiver to secure the recovery of arrears of rent due, and the punctual payment of the accruing rents.[1] But where plaintiff seeks the appointment of a receiver over property in the hands of defendants, alleging that they hold it in trust for him, a denial of the trust does not of itself render it necessary to appoint a receiver on the establishment of the trust. Under such circumstances, if no ground of apprehension is shown that loss may occur by permitting the property to remain in its appropriate use in the occupancy of defendant, and his ability to respond for its use is admitted, and he has already been ordered by the court to account for the rents and profits that he may have received, a receiver will be refused.[2]

§ 585. Receivers are sometimes granted over real property for the protection of equitable incumbrancers, or creditors whose demands are a charge upon the property, when the aid of equity is necessary for the protection of their rights. And where plaintiff in an action to raise the arrears of a rent-charge, due him out of defendant's real estate, obtains a decree for a sale of the property, but defendant obstructs the decree, and does not comply with the requirement of court to produce his deeds, thus preventing a sale of the property, a receiver may be allowed.[3] So it would seem, where a person takes a conveyance of a legal estate, subject to certain prior equitable interests consisting of rent-charges thereon, if he refuses to satisfy such claims, that a receiver may be appointed upon application of the person entitled to the rent-charges.[4] And when a receiver

[1] Wilson *v.* Wilson, 2 Keen, 249.

[2] Hamburgh Manufacturing Co. *v.* Edsall, 3 Halst. Ch., 298; S. C., 4 Halst. Ch., 141.

[3] Shee *v.* Harris, 1 Jo. & Lat., 91.

[4] Pritchard *v.* Fleetwood, 1 Meriv., 54.

is sought of the rents and profits of real property, by an equitable creditor or incumbrancer, having a charge upon the property, but having no right of entry or possession, if the court is satisfied in the preliminary stage of the cause that the relief sought by the bill will be given when the final decree is pronounced, it will not expose parties claiming such relief to the danger of losing the rents by not appointing a receiver. But when, in such case, the amount due plaintiff from defendant is tendered and accepted, the receiver previously appointed will be discharged.[1]

§ 586. In New York, it is held that the plaintiff in an action for the foreclosure of a mechanic's lien, under the laws of the state, is not entitled to a receiver of the rents and profits of the property *pendente lite*, even though it is alleged that the owner of the premises is insolvent and is collecting the rents, and that there are prior incumbrances on the property, the interest on which the owner neglects to pay.[2]

§ 587. A special receivership, for the purpose of collecting rents accruing out of real estate, is sometimes necessary in aid of proceedings in bankruptcy. And although the courts seem to be averse to appointing receivers in such proceedings, yet if it is manifest that the apparent titles to property, in which the bankrupt estate is interested, are on their face such that the rents can not, under the usual warrant in bankruptcy, be efficiently and successfully collected, a receiver will be allowed.[3] And a circuit court of the United States, upon a bill for that purpose by the assignee in bankruptcy, will appoint a receiver to take charge of real estate owned by the bankrupt to which there are con-

[1] Davis *v.* Duke of Marlborough, 2 Swans., 138.

[2] Meyer *v.* Seebald, 11 Ab. Pr., N. S., 326, note. But see, *contra*, Webb *v.* Van Zandt, 16 Ab. Pr., 314, note, which was a case in the New York Common Pleas, holding that an injunction and a receiver might be granted in such an action, but that if plaintiff had instituted another action to recover the same indebtedness, he would be allowed a receiver only on condition of discontinuing such other action.

[3] Keenan *v.* Shannon, 9 Bank. Reg., 441.

flicting claims and liens, which are before the court for adjustment, such a case being regarded as an eminently proper one for a receiver to take charge of the property, until the validity of the liens may be determined, in order that the interests of all creditors may be properly secured.[1] And in England, the assignee of an insolvent debtor, who is prevented from recovering an estate owned by and in possession of the debtor by reason of former proceedings in bankruptcy against him, may maintain a bill in chancery to recover the property, upon which he may procure a receiver of the rents *pendente lite*.[2]

§ 588. When the purpose of the litigation is to apply certain trust property in payment of an indebtedness secured by deed of trust upon the property, and there are conflicting claims to be satisfied, which are of equal justice and merit in themselves, so that the question presented is as to who is entitled to prior satisfaction in the event of the property proving insufficient for all, a proper case is presented to warrant a receiver for the management of the property.[3]

§ 589. With regard to the nature or extent of a defendant's interest in realty necessary to warrant a court of equity in appointing a receiver thereof, at the suit of an incumbrancer, it is held in England, that where defendant's right or estate is such that his creditors may have execution against it by writs of *elegit*, a sufficient interest is shown to justify the appointment of a receiver.[4] And, under the former practice in England, receivers were allowed over the benefice of a clergyman of the established church, when he had made the debt on which the proceedings were instituted a charge upon his benefice.[5]

§ 590. As regards the right to a receiver of crops grown upon leased premises, it is held that a mere contract between

[1] McLean *v.* Lafayette Bank, 3 McLean, 503.

[2] Hollis *v.* Bryant, 12 Sim., 492.

[3] Hamberlain *v.* Marble, 24 Miss., 586.

[4] Davis *v.* Duke of Marlborough, 1 Swans., 74.

[5] White *v.* Bishop of Peterborough, 3 Swans., 109; Silver *v.* Bishop of Norwich, id., 112, note.

the owner of land and a tenant, providing for the working of the land by the tenant for a specified time, and compensation to be paid the owner out of the crops raised thereon, does not give the owner such equities as to entitle him to an injunction against the removal of the crops by the tenant, or a receiver to manage the land and take possession of the ungathered crop.[1] But when the litigation concerns the title to land, which is claimed by both parties, both also claiming to be in possession, and when they are interfering with each other in harvesting the crops grown by each respectively and threatening each other with assaults and with forcible resistance, an appropriate case is presented for a receiver until the rights of the parties can be finally determined.[2]

§ 591. When, upon her marriage, certain moneys are settled upon a wife for her separate use and benefit, being vested in trustees for that purpose, to be by them invested in securities, and the husband afterward induces the trustees, in violation of their trust, to invest the money in realty, upon which he expends money in improvements and repairs, the husband will not be allowed a receiver of the rents and profits on a bill filed by him against the wife and the trustees, to reimburse him for his outlay.[3] And when plaintiff's rights were under a marriage settlement, whereby he claimed his wife's fortune to be a charge upon the fee of defendant's estate, and defendant had neglected to pay the interest due, it was held not to be such a case as to justify a receiver; since, if plaintiff should establish at the hearing that his claim was a charge upon the fee, he would be entitled to sell the inheritance, and the fund not being shown to be insufficient, the court refused to interfere *in limine.*[4] But when husband and wife entered into an agreement that they should mutually enjoy and share certain real estate, and the wife afterward procured a divorce from the

[1] Williams *v.* Green, 37 Ga., 37.

[2] Hlawacek *v.* Bohman, 51 Wis., 92.

[3] Wiles *v.* Cooper, 9 Beav., 294.

[4] Drought *v.* Percival, 2 Mol., 502.

husband, upon a bill by her alleging that the husband was in the sole occupancy of the property and enjoying all the rents, and that he was insolvent and unable to respond in damages, a receiver was granted, and was directed to pay half the rents to the husband and to retain the other half to await the final decree.[1]

§ 592. It has already been shown that a defendant's possession of real property, under claim of title, will not be disturbed by a receiver when adequate relief may be had in the usual forms of procedure at law. And the mere fact of difficulties existing in the way of enforcing the ordinary legal remedies to compel payment of rent due upon premises demised is not, of itself, sufficient to give a court of equity jurisdiction to appoint a receiver, when those remedies are still open to the party aggrieved.[2]

§ 593. It is in all cases essential that a plaintiff, seeking the aid of a receiver over real property, should use due diligence in the assertion of his rights, since long acquiescence in defendant's possession may suffice to bar him from the relief to which he might otherwise be entitled. And when a shareholder in a corporation seeks a receiver over real property held by a defendant, alleging it to be the property of the corporation, but plaintiff has acquiesced in defendant's possession and use of the property for a number of years without question or remonstrance, and shows no danger on the ground of defendant's responsibility, he will not be allowed a receiver. And when, in such a case, it appears that the property over which a receiver is sought was accumulated through fraud on the part of the corporate authorities, of which plaintiff, as a shareholder, was fully cognizant, and in which he had acquiesced without complaint for several years, his application is properly refused.[3]

[1] Baggs *v.* Baggs, 55 Ga., 590. As to the circumstances under which a receiver may be allowed over property of the husband in a proceeding for alimony, see Holmes *v.* Holmes, 29 N. J. Eq., 9.

[2] Cremen *v.* Hawkes, 8 Ir. Eq., 153, affirmed on appeal, id., 503.

[3] Hager *v.* Stevens, 2 Halst. Ch., 374.

§ 594. A receiver may be appointed of the rents and profits of real estate which is found to have escheated to the state, upon a proceeding instituted by the state for that purpose, when it is shown that the relief is necessary for the purpose of collecting the rents forthwith, which would otherwise be lost.[1]

§ 595. It would seem to be proper, on an application for a receiver over real property, when the defendant, against whose possession the receiver is sought, consents to pay the rents and profits into court, to refuse the application for a receiver.[2]

§ 596. One who is not a party to the action, although claiming certain lands which are subject to the receivership, can not be heard to show cause against making a conditional order for the receiver absolute, his proper method of redress being by application to the court to remove the receiver as to such lands as he claims.[3] And a motion by a remainder-man and by tenants of premises, which had been placed in the hands of a receiver, to restrain him from turning them out of possession, was refused on the ground that their interest was insufficient to sustain the application.[4]

§ 597. When a receiver is appointed over real property in the possession of the owner, the proper course is to make application to the court for an order directing the owner to surrender possession to the receiver, since the latter can not distrain upon the owner in possession, who is not a tenant of the receiver. If, therefore, a loss occurs by reason of the receiver allowing the owner to remain in possession, it will be regarded as the fault of the parties in interest in the cause in not applying for an order upon the owner to deliver up possession.[5]

§ 598. A receiver of the rents of real property may be appointed upon bill and affidavits in support thereof, before

[1] People v. Norton, 1 Paige, 17.
[2] Prebble v. Boghurst, 1 Swans., 309.
[3] Creed v. Moore, 4 Ir. Eq., 684.
[4] Wynne v. Lord Newborough, 1 Ves. Jun., 164.
[5] Griffith v. Griffith, 2 Ves., 400.

answer, in a case of emergency requiring the immediate interference of the court for the protection of plaintiff's equities.[1] But the appointment will not be made when the person in possession is not a party to the cause and not before the court.[2]

§ 599. As regards the effect of the appointment of a receiver over a corporation upon the title to its real estate, it would seem that when the appointment is merely *pendente lite*, and no assignment is executed by the corporate body to the receiver, the title is not divested, the proceedings being regarded as inchoate, and the right of the receiver as only a possessory right for the purposes of the suit.[3] Where, however, a receiver is appointed upon the dissolution of a corporation, it is held that the title to its realty vests in the receiver, for the benefit of creditors and shareholders.[4]

§ 600. It is important that the order appointing a receiver over real property should state distinctly and clearly the particular property over which he is appointed. And when it is so indefinite in this respect that it does not appear what property is subject to the receiver's control, the court will not enjoin the real owner from interfering with the property or collecting its rents.[5] But cases are sometimes met with in the books, where a receiver has been appointed over a portion of the real estate in controversy, and not over the whole.[6]

§ 601. When a receiver is appointed to take charge of the proceeds arising from real estate, pending litigation concerning the right thereto, and judgment is finally rendered for plaintiff, he is entitled to an order of court directing the receiver to deliver the funds into his possession. And upon an application for such order, the court will not

[1] Woodyatt *v.* Gresley, 8 Sim., 180.

[2] Mays *v.* Wherry, 3 Tenn. Ch., 34.

[3] Montgomery *v.* Merrill, 18 Mich., 338.

[4] Owen *v.* Smith, 31 Barb., 641.

[5] Crow *v.* Wood, 13 Beav., 271.

[6] Calvert *v.* Adams, Dick., 478.

presume that the receiver transcended his authority, and will not grant a reference to a jury or referee, to determine how much of the fund rightfully belongs to plaintiff, or to ascertain who is entitled to the money in the receiver's hands.[1]

§ 602. Since the right of a receiver can not outlast the action in which he was appointed, nor be used for any purpose not justified thereby, it is held that, upon the termination of the receiver's functions, when no assignment was made of his real estate by the defendant to the receiver, the real estate is subject to the lien of a judgment and execution against the defendant to the same extent as if there had been no receivership.[2]

§ 602 *a*. The power of a court of equity to take possession, through a receiver, of property which is liable to waste and irremediable loss, if suffered to remain in the possession of a defendant pending a litigation as to its title, may also be exercised against a plaintiff who has taken possession from defendant and whose possession threatens similar injury to the property. And when plaintiff, suing *in forma pauperis* for the recovery of land, during the pendency of the action takes possession of a portion of the premises and resists their reoccupation by defendants claiming title thereto, a receiver may be had upon the application of defendants to take possession of the usurped premises and to secure their rents until the determination of the cause.[3]

[1] Whitney *v.* Buckman, 26 Cal., 447.

[2] Montgomery *v.* Merrill, 18 Mich., 338.

[3] Horton *v.* White, 84 N. C., 297.

II. Receivers as Between Tenants in Common.

§ 603. As between tenants in common or joint owners of real property, courts of equity manifest the same aversion to the appointment of receivers as in other cases where the jurisdiction is invoked against a defendant in possession, under claim of title, in a controversy concerning the right to the disputed property. And it may be stated as a general rule, that a receiver will not be appointed, as between tenants in common of realty, unless a case is presented amounting to an exclusion by the defendant of his co-tenants from the enjoyment or possession of the property.[1] And when the application for a receiver was founded on an affidavit of improper management by the defendant, and of a reservation of the profits not amounting to an exclusion of his co-tenants, which was met by counter affidavits of a balance due to defendant on an unsettled account, and an agreement for a reference to arbitration, the charges of improper management being also denied, it was held that no case was presented for a receiver.[2]

§ 604. Where, however, one tenant in common is in possession of the property and in receipt of the entire rents and profits, excluding his co-tenants from all participation therein, a stronger case is presented for relief in equity,

[1] Milbank *v.* Revett, 2 Meriv., 405; Vaughan *v.* Vincent, 88 N. C., 116; Cassetty *v.* Capps, 3 Tenn. Ch., 524.

[2] Milbank *v.* Revett, 2 Meriv., 405.

especially when the defendant in possession is insolvent and unable to respond in damages; and in such cases, the right to a receiver in behalf of the tenant excluded is regarded as well established.[1] Thus, where a tenant in common of valuable mill property, who, in addition to his interest as a co-tenant, also claims a vendor's lien for a portion of the property sold by him to defendants, shows by his bill that the defendants, his co-tenants, are in possession and receiving the profits, which they refuse to share with the plaintiff, and that they are managing the property in so careless a manner that the mills are losing much of their custom. and that they are wholly insolvent, except as to their interest in the property in question, a clear case is presented for the aid of a receiver. In such a case, the relief is based largely upon the inadequacy of the remedy at law for the protection of plaintiff in his right to the profits, while the property remains in defendants' possession.[2]

[1] Williams *v.* Jenkins, 11 Ga., 595. And see Street *v.* Anderton, 4 Bro. C. C., 414; Sandford *v.* Ballard, 30 Beav., 109. But see Tyson *v.* Fairclough, 2 Sim. & St., 142, where a doubt is expressed as to whether even an actual exclusion of one tenant in common by another constitutes ground for a receiver, since if the exclusion amounts to an ouster at law, the party aggrieved may assert his legal title at law; and if not such an exclusion, the court would compel the tenant in common in receipt of the rents to account to his co-tenant.

[2] Williams *v.* Jenkins, 11 Ga., 595. Mr. Justice Warner, for the court, says, p. 598: "Do the allegations in this bill shew that the discretion of the chancellor in the appointment of a receiver was properly exercised? The complainant is the owner of one-third part of valuable property consisting of a saw and grist mill, as a tenant in common with the defendants, who are in possession of the same, which is of the annual value of one or two thousand dollars. The complainant alleges the bad management of the mills by the defendants: their intention to defraud him, as manifested by their various acts, which the complainant specifically alleges, and that they are insolvent, except as to their interest in the mill property; that there is now due the complainant for the original purchase money of said mills, from the defendants, the sum of $3,716. Assuming the original price paid for the property to be its true value, (to wit) $5,500, the two-thirds thereof, which the defendants now own, is worth about the sum of $3,666, which is less than the amount of the original purchase money now due the complainant, so that when the original purchase

§ 605. As regards the extent of the receivership, in the class of cases under consideration, it is held that a plaintiff, claiming a moiety of an estate as a tenant in common with defendant, may have a receiver of the rents and profits of such moiety, when defendant is in possession of the whole; and he may also have an injunction to restrain defendant from receiving the rents of such moiety, as well as an order upon the tenants of that part of the estate to attorn to the receiver.[1] So it has been ordered that a tenant in common in possession should give security to his co-tenant for the portion of rents due him, or in default thereof that a receiver be appointed.[2] And in the case of equitable tenants in common of realty, the legal title to which is in a trustee

money shall be paid to the complainant (for which he asserts his vendor's lien), the defendant will have nothing to pay him for his share of the annual rents and profits thereof. The defendants are in the possession and enjoyment of the property, and refuse to allow the complainant to participate in the same, in any manner whatever. The complainant shows that he has offered to take possession of the mills, and give bond and security to the defendants, to account to them for their share of the profits; or to let them continue in possession on their doing the same, to account to him for his share of the profits, which they have refused. The plaintiff in error, however, insists that a court of equity will not interfere, and appoint a receiver, at the instance of one tenant in common against another, who is in possession, because the party complaining may relieve himself at law, by a writ of partition. Concede that the complainant in this case might have a writ of partition at law, for his share of the property, what adequate remedy has he at law, in the meantime, for the profits of the mills, while in the possession of the defendants, who are insolvent? We entertain no doubt that a court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent. 2 Story's Equity, § 833; Street *v.* Anderton, 4 Brown's Chan. Rep., 415; Milbank *v.* Revett, 2 Merivale, 405. The discretion of the chancellor in appointing a receiver, in this case, was, in our judgment, properly exercised; therefore, let the judgment of the court below be affirmed."

[1] Hargrave *v.* Hargrave, 9 Beav. 549.

[2] Street *v.* Anderton, 4 Bro. C. C 414.

for the benefit of the co-tenants, the fact that the trustee has put one of the co-tenants in possession will justify a receiver in behalf of the other tenants over their own shares, but not over the entire property, since the tenant in possession is entitled to the possession of his own share of the property.[1] But when the conduct of the defendant in possession is such as to amount to an exclusion of his co-tenants, they are entitled upon the hearing to a receiver of the whole property.[2]

§ 606. While, as has already been shown, equity is generally averse to extending the aid of a receiver, as between joint owners or tenants in common, yet in cases of mining property or collieries, there would seem, from the nature of the property, to be stronger reasons why the relief should be allowed when there is a disagreement as to the management of the property, than in cases of ordinary real estate. And where there are a large number of persons interested and owning shares in mining property, as in a colliery, upon a difficulty between them as to the management of the property, a receiver may be allowed, although the owners are tenants in common, the relief being granted to prevent the destruction of the subject-matter.[3] So in an action brought

[1] Sandford *v.* Ballard, 30 Beav., 109.

[2] Sandford *v.* Ballard, 33 Beav., 401.

[3] Jefferys *v.* Smith, 1 Jac. & W., 298. Lord Eldon, in this case, referring to a note of a case before Lord Hardwicke, in which he held that a colliery was in the nature of a trade, persons owning different interests in which were to be regarded as in the nature of partners, and that the difficulty of management gave a court of equity jurisdiction as to mesne profits which it would not assume with regard to other lands, observes: "On this ground, and on account of the peculiarity of this species of produce, the court gives an injunction against trespassers, and allows a party to maintain a suit for the profits, which, in other cases, it would not do. Here there are twenty shares; and if each owner may employ a manager and a set of workmen, you destroy the subject altogether; it renders it impossible to carry it on. It appears to me, therefore, upon general principles, without reference to the particular circumstances of any case, that where persons are concerned in such an interest in lands as a mining concern is, this court will appoint a receiver, although there

by plaintiffs claiming to be the sole owners of a gold mine, averring that defendants have unlawfully entered upon the mine and are taking away the gold, defendants claiming an interest as co-tenants, while the court may refuse to enjoin the working of the mine upon grounds of public policy and because of the peculiar nature of the property, a receiver may be allowed *pendente lite*, the defendants being of doubtful responsibility.[1]

§ 607. The aid of a receiver is sometimes granted in actions for the partition of real estate between tenants in common, when it is apparent to the court that the relief is necessary to protect all parties in interest.[2] And in such an action, when defendants not only deny plaintiff's title, but have endeavored to entangle the whole title, and are not disposed to account for the rents and profits, equity may interfere by a receiver.[3] And when, in an action for partition, it is shown that a portion of the property can not be rented, in consequence of the refusal of one of the tenants in common to unite with the others, and that the rents of the remaining portions can not be collected because of the interference of such co-tenant, a receiver may be appointed to preserve the property from loss *pendente lite*.[4]

§ 608. Where one of several co-tenants has entered into an agreement with the others, whereby they are authorized to receive all the rents of the premises until they have repaid an amount due them, the fact that such co-tenant afterward notifies the tenants of the premises to pay their rents to him, and not to his co-tenants, affords no ground for interfering by the appointment of a receiver, such a notice not being regarded as equivalent to an exclusion.[5]

are tenants in common of it. Take the order for a receiver, and let every owner be at liberty to propose himself as manager before the master."

[1] Parker *v.* Parker, 82 N. C., 165.

[2] Pignolet *v.* Bushe, 28 How. Pr., 9; Duncan *v.* Campau, 15 Mich., 415; Weise *v.* Welsh, 30 N. J. Eq., 431; Goodale *v.* Fifteenth District Court, 56 Cal., 26.

[3] Duncan *v.* Campau, 15 Mich., 415.

[4] Pignolet *v.* Bushe, 28 How. Pr., 9.

[5] Tyson *v.* Fairclough, 2 Sim. & St., 142.

III. Receivers as Between Vendors and Purchasers.

§ 609. The aid of equity by a receiver is sometimes necessary as between vendors and purchasers of real property, either in connection with proceedings to compel a specific performance of the contract of sale, or for the protection of the rights of a purchaser after sale. And the vendor of real estate, upon a bill against the vendee for a specific performance of the contract of purchase, may have a receiver in aid of his action when it is shown that the defendant is insolvent, and that all his property, real and personal, including the estate which is the subject of the contract, is about to be conveyed to trustees for the benefit of his creditors. The relief, under such circumstances, is warranted upon the ground that, if the contract can be enforced, the vendor has a lien upon the property for the unpaid purchase money; while, if it can not be enforced, the purchaser has a lien to the extent of the amount already paid by him on account of his purchase; and upon the further ground that the purchaser's insolvency and attempt to convey the estate would embarrass the title.[1] So when a person has con-

[1] Hall *v.* Jenkinson, 2 Ves. & Bea., 125. It is to be noticed that in this case, the purchaser had never been let into exclusive possession

tracted for the purchase of real estate, but is dissatisfied with the title, and refuses on that ground to conclude the purchase, in an action against him to enforce a specific performance of the contract, a receiver may be appointed for the management of the property, pending a reference to determine as to the validity of the title.[1] When a receiver is appointed in aid of a bill against the purchaser for specific performance of his agreement, if defendant is compelled by the court to carry out the agreement and to complete his purchase, the receiver will be considered as his receiver, and the receiver's possession as his possession.[2] But since, in such an action, the receivership is merely ancillary to the principal relief sought, if the principal remedy is prematurely invoked, there being no default which would entitle the vendor to a sale, the order appointing a receiver should be revoked.[3] And in Tennessee, the courts refuse the aid of a receiver, in an action to enforce a vendor's lien, upon the ground that it is no part of the contract of sale, either expressed or implied, that the vendor shall appropriate anything but the land itself by a sale to satisfy the unpaid purchase money, and because by the contract the purchaser is entitled to possession until the land is sold in satisfaction of the debt.[4] But in the same state, after a decree in favor of vendor seeking to subject the land to the payment of the purchase money, from which decree defendant has appealed, the failure of defendant to pay taxes has been held to be sufficient ground for a receiver pending the appeal.[5]

§ 610. The relief, in the class of cases under consideration, is not confined to actions for specific performance, brought by a vendor against the vendee, but the jurisdiction is also exercised in behalf of the vendee instituting such an action. And upon a bill by the vendee to compel specific per-

of the premises, the possession having been partly in the vendor and partly in the purchaser.

[1] Boehm *v.* Wood, 2 Jac. & W., 236.

[2] Boehm *v.* Wood, Turn. & R., 332.

[3] Jones *v.* Boyd, 80 N. C., 258.

[4] Morford *v.* Hamner, 3 Baxter, 391.

[5] Darusmont *v.* Patton, 4 Lea, 597.

formance of the contract of sale, a receiver may be appointed to secure the property *pendente lite*, when the vendor has fraudulently repossessed himself of the property.[1]

§ 611. When a vendor of real estate, who has never parted with the legal title, having only given the purchaser a title bond, sues to recover possession because of non-payment of purchase money, and seeks to have the property sold and its proceeds applied in payment of the purchase price, it is proper to appoint a receiver to take charge of the property, upon allegations of defendant's insolvency, and that he is committing waste by cutting off the timber, which constitutes the chief value of the property.[2] But the appointment of a receiver, in such a case, does not in law have the effect of changing the possession, but only suspends the right of actual enjoyment pending the litigation.[3] And when the vendor of real estate, having given a bond or contract to convey, upon default of the purchaser, files a bill for the specific performance of the contract and for a sale of the land, if the premises are an inadequate security for the unpaid purchase money and the vendee is insolvent, the vendor is entitled to a receiver of the rents and profits *pendente lite*, upon the same ground that a mortgagee is entitled, under like circumstances, to a receiver in aid of a foreclosure.[4] So when the vendee is in possession under a

[1] Dawson *v.* Yates, 1 Beav., 301.

[2] McCaslin *v.* State, 44 Ind., 151. The court, Buskirk, J., say, p. 174: "Nor do we think the court exceeded its power in appointing a receiver. The third clause of section 199, 2 G. & H. (statutes), 152, authorizes the appointment of a receiver 'in all cases when it is shown that the property, fund or rents, and profits in controversy is in danger of being lost, removed, or materially injured.' There seems to be no room to doubt that the cutting down and removing of valuable timber from the land in controversy, and especially where defendant only claimed the title and possession of such land under a title bond, the purchase money being unpaid, and it being alleged and proved that the defendant was insolvent, would be such material injury as would justify the court in appointing a receiver to take charge of and preserve such land during the litigation." But see Guernsey *v.* Powers, 9 Hun, 78.

[3] McCaslin *v.* State, 44 Ind., 151.

[4] Phillips *v.* Eiland, 52 Miss., 721; Smith *v.* Kelley, 31 Hun, 387.

bond to convey title and receives the rents and profits for several years, permitting the premises to deteriorate in value through want of repairs and improper cultivation, so that they are insufficient to pay the amount due, and the vendee becomes insolvent and is adjudicated a bankrupt, a receiver of the rents and profits will be appointed until the final hearing, no part of the purchase money, principal or interest, having been paid.[1] But the mere insolvency of the vendee, if known to the vendor at the time of sale, will not warrant a receiver upon a bill to rescind the contract of sale and for an accounting of rents, no fraud being charged in the bill, and the allegations of waste being fully denied.[2] And when it is not shown that the vendee is insolvent, and the amount of the indebtedness is disputed and undetermined, a receiver should not be appointed.[3] But in Kentucky, the general doctrine under consideration does not prevail, and it is there held that when the vendor conveys real estate and delivers possession to his vendee, reserving a lien for the purchase money, the lien attaches to the land and not to the rents and profits. The vendee, therefore, having the legal title and the right to the use and occupancy of the property, a receiver will not be appointed in an action to enforce the lien, in the absence of waste or improper cultivation, although it is shown that the vendee is insolvent and that the land is not worth more than the amount of the indebtedness.[4]

§ 612. Purchasers of real estate, as against an adverse party in possession claiming a paramount title, have been allowed the protection of a receiver upon a bill to perfect their title against such adverse claimant; although the relief is proper only when it is apparent that the purchaser seeking the aid of the court has a good equitable title, against which defendant's title can not prevail, and that the

[1] Tufts *v.* Little, 56 Ga., 139. See, also, Gunby *v.* Thompson, 56 Ga., 316; Chappell *v.* Boyd, 56 Ga., 578; Worrill *v.* Coker, 56 Ga., 666.

[2] Jordan *v.* Beal, 51 Ga., 602.

[3] Hughes *v.* Hatchett, 55 Ala., 631.

[4] Collins *v.* Richart, 14 Bush, 621.

purchaser can compel the performance of his contract of purchase. Thus, purchasers for value from a husband have been allowed a receiver, as against a voluntary settlement made by the husband upon his wife after marriage, upon the ground that such settlement gave no title as against the purchasers, who were, therefore, entitled to a specific performance of their contract. And the receiver may be appointed, under such circumstances, before answer.[1]

§ 613. A purchaser of lands at a judicial sale, who obtains a sheriff's deed therefor, upon the expiration of the statutory period of redemption, is entitled to possession of the lands, and of the crops growing thereon as an incident to the realty. He may, therefore, in an action to obtain such possession, have a receiver to take charge of the growing crops with a view to properly harvesting and preparing them for market, and holding the proceeds subject to the final order of the court, defendants being alleged to be in a condition of insolvency.[2] And it is an appropriate exercise of the jurisdiction to appoint a receiver in aid of the possession of a purchaser at a sheriff's sale, under judgment,

[1] Metcalfe *v.* Pulvertoft, 1 Ves. & Bea., 180.

[2] Corcoran *v.* Doll, 35 Cal., 476. Sawyer, C. J., for the court, says, p. 479: "If the facts stated in the complaint are true, plaintiffs acquired the title to the land, and the defendants are properly restrained from selling or incumbering the land, till the rights of the parties can be determined. So, also, we think the record shows a proper case for restraining an appropriation of the crops and for a receiver. It is not a question of rents and profits merely, during the time for redemption. That time had already expired, and the plaintiffs had obtained the sheriff's deed and were entitled to the possession of the land. The growing crops belonged to the plaintiffs as a part of the land. The principal parties are alleged to be insolvent, and all the transactions on the part of the defendants, on the theory of the complaint, constitute a scheme to defraud the plaintiffs, to which the pretended tenant in possession, as well as the other defendants, was a party. We think there is clearly a cause of action stated, both for an injunction and a receiver. If the tenant in possession is entitled to anything for his services in cultivating the land during the time for redemption, he is a party to the suit, and his equities can be adjusted when the affairs of the receivership are settled up."

upon a bill alleging that the defendant debtor has fraudulently conveyed his real estate with a view to delay and defeat his creditors. Such a state of facts, it is held, would clearly warrant a receiver in aid of the judgment creditor himself, and the right of a purchaser at a sale under the judgment to the same relief is deemed equally clear.[1]

§ 614. While the courts are usually averse to taking possession of lands by a receiver pending litigation between conflicting claimants, it is held, in California, that the working of gold mines and the extraction of gold therefrom are something more than the ordinary use of real estate by one in possession, requiring more than the usual remedies for the protection of a purchaser. Such a use of the realty constitutes a waste or destruction of the very property itself, or all that is of essential value. It is, therefore, held that a purchaser at a mortgage sale of an interest in a mining claim may have a receiver, when the mortgagor is still in possession, working the claim and refusing to pay the purchaser his interest in the dividends, it being alleged that the mortgagor is insolvent, and that the claim will be worked out and exhausted before the statutory period for redemption expires.[2]

§ 615. The aid of a receiver is sometimes granted in cases of mines or collieries pending a litigation which is to determine the title and rights of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved *pendente lite*. Thus, where purchasers of a colliery file their bill to set

[1] Mays *v.* Rose, Freem. (Miss.), 703.

[2] Hill *v.* Taylor, 22 Cal., 191. It is to be observed that the Practice Act of California, § 143, provides that a "receiver may be appointed by the court in which the action is pending, or by a judge thereof, first before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired."

aside their purchase and to enjoin their notes given for purchase money, on the ground of fraudulent representations made by defendants to induce them to purchase, if, on the case presented, there is much doubt as to the ownership of the colliery, and it is of importance that it should be worked to prevent flooding and other injury, and also to prevent a forfeiture to the landlord, a fit case is presented for the appointment of a receiver *pendente lite.* And the relief, in such a case, is founded upon the necessity of preserving the property pending the controversy, in order that, when it is finally determined to whom it belongs, full and complete justice may be done. And plaintiffs may be required to supply the means of carrying on the colliery, reserving the ultimate question of expense for future determination. The receiver thus appointed will be required to keep the colliery going, and out of its receipts to pay all outgoings; and if the receipts are insufficient, plaintiffs may be required to supply him with the necessary funds for that purpose.[1] But

[1] Gibbs *v.* David, L. R., 20 Eq., 373. The doctrine of the text is very clearly stated in the opinion of Vice-Chancellor Malins as follows, p. 375: "As far as I know of the case at present, although the precise circumstances certainly have not occurred before, I can not help thinking that, upon principle, I shall not much err if I accede to the application of the plaintiffs. The question brought before the court is a very remarkable one. The two plaintiffs, Mr. Gibbs and Mr. Joachim, are, it is stated, merchants in the city of London, and their case is this: that, by representations made to them by the defendant Webb, they have been induced to purchase a colliery in South Wales. They allege that the representations made by Webb were entirely false, and that if they had known the falsehood of such representations they would not have purchased the colliery. The persons from whom the colliery was bought are Mr. Cotton's clients, Charles William David and John Sloper, and, of course, if it turns out that, whatever representations were made by Webb, they were made without the knowledge of these two defendants, they will not be answerable, and the suit will fail. But the bill alleges that, in point of fact, Webb was the bribed agent of these defendants to make these false representations; and if this turns out to be the truth, and is established at the hearing, the contract will be set aside, the suit will succeed, the plaintiffs will be entitled to be relieved from all further payments, and will take out of court all the

when the effect of appointing a receiver in a controversy as to the right to mining property is to suspend the opera-

moneys paid in and all that may be hereafter brought in. In other words, the contract will be undone. But the property is a colliery, and a going colliery, and both sides admit that it must be kept going or the lease will be forfeited; and moreover, if it is not kept going, it will be drowned out, and, therefore, it is absolutely necessary it should be worked. In this state of things, I think it is clearly uncertain to whom the colliery belongs. If the plaintiffs are right in their allegations on the bill, the colliery does not belong to them, but to David and Sloper. If, on the other hand, the allegations are erroneous, then the colliery belongs to the plaintiffs, and David and Sloper have nothing to do with it. It is according to the practice of the court to keep property in security until the right is decided, and therefore, it being totally uncertain to which of these two parties this colliery belongs, it does seem to me, in accordance with practice and principle, that the property shall, as far as possible, be kept in security. Then, it is asked, why should this be done? The plaintiffs are in possession; they say that they were fraudulently induced to take possession, and, being in possession, they are incompetent to deal with the property in its present position, and if they should succeed in this suit they will have a demand against the defendants for all moneys properly expended in working the colliery. It is of very great importance that the colliery should be so worked as to leave as little doubt as possible whether it was properly or improperly worked. If the court appoints an officer competent to manage a colliery, and he says, 'I have carried on the colliery and made a gain,' then the gain will belong to the party to whom the mine belongs. If, on the other hand, he says, 'I have been obliged to carry on the colliery at a loss,' that loss will have to be borne by the plaintiffs, if they fail in their suit, and by the defendants if the plaintiffs succeed. Now I will assume, in favor of the defendants, that all these charges are unfounded and that the suit will fail, and I will continue to act upon that assumption until the contrary is approved. If, therefore, the suit does fail, and a receiver is appointed, and he is supplied with the means of carrying on the colliery by the plaintiffs, what damage will be done to the defendants? It is impossible that they can be damaged to the extent of a farthing. If, on the other hand, the suit should succeed, then a very material benefit may arise to the plaintiffs in the manner I have pointed out, on its being ascertained in this way what is the proper expenditure in carrying on the colliery. Therefore I shall do what this court is constantly in the habit of doing when property is in dispute, and as was done in Boehm *v.* Wood, 2 Jac. & W., 236. . . It seems to me, in this case, that the court should appoint a protector or manager of the estate, in order that,

tion of the mines, the receiver having no funds with which to meet the necessary outlays, the appointment will be regarded as improvident, and the receiver will be discharged, when it is not alleged that defendants in possession are insolvent, or that they are unable to account for the mesne profits, or that the property is being injured under their management.[1]

§ 616. Equity will not entertain a bill for a receiver of the rents and profits of real property which will affect the interests of purchasers of the property who are not made parties to the action, since all parties directly interested in the subject-matter must be brought before the court. And when this is not done, a demurrer to the bill for want of proper parties will be sustained.[2]

§ 617. Where a receiver sold real estate at auction under an order of court, and the purchasers afterward refused to complete the purchase on the ground of an alleged defect of title, but the court ordered them to complete the purchase, and the receiver afterward consented that the order should be held void and that the purchase might be annulled, the receiver was required by the court to return the purchase money, together with counsel fees to the purchasers for examining the title and in resisting the proceeding to have the purchase perfected.[3]

when it is decided to whom it belongs, justice may be done. Therefore, upon principle, and, I think, upon authority, I shall accede to the application that a receiver be appointed. The plaintiffs must supply the means of carrying on the colliery, and, as in Boehm *v.* Wood, 2 Jac. & W., 236, the question at whose expense the receiver is to be appointed and the colliery is to be carried on will be reserved. If the suit succeeds, it will be at the expense of the defendants."

[1] Carter *v.* Hoke, 64 N. C., 348.

[2] Lumsden *v.* Fraser, 1 Myl. & Cr., 589, affirming S. C., 7 Sim., 555.

[3] Drake *v.* Goodrich, 6 Blatchf., 531.

IV. Functions of the Receiver.

§ 618. The most important function of a receiver over real estate is the control of the rents and profits accruing from the property pending the receivership, the right to such rents being generally vested in the receiver by his order of appointment. And in appointing a receiver over real property of a defendant, the correlative rights of landlord and

tenant subsisting between the defendant and his tenants are not changed. The court, through its receiver, takes upon itself the possession previously existing in defendant, and while the court has additional and larger powers for enforcing the landlord's rights, the rights themselves remain unaltered.[1] It was the practice of the English Court of Chancery, on appointing a receiver of the rents and profits of realty, to direct that the tenants attorn to the receiver, and if they refused so to do the proper course was to move that they be required to attorn, thus enabling them to be heard before the court as to whether they were actually tenants of the premises in controversy. And if no cause was shown by the tenants against such motion, the court would grant an order requiring them to deliver up possession to the receiver.[2] When a tenant of a portion of the property under a former lease attorns to the receiver, and for a time pays him the rent, upon his subsequent refusal to pay rent to the receiver the court will grant an order compelling him so to do.[3]

§ 619. Under the practice of the Irish Court of Chancery, the receiver is entitled to all arrears of rent unpaid at the time of the order of reference for his appointment.[4] And although the tenants are only responsible from the service of the order requiring them to pay to the receiver, yet the person entitled to receive the rent and arrears is bound from the date of the order of reference to appoint, when he has had notice of such order.[5] And when a receiver is appointed

[1] Commissioners *v.* Harrington, 11 L. R., Ir., 127.

[2] Reid *v.* Middleton, Turn. & R., 455.

[3] Hobson *v.* Sherwood, 19 Beav., 575.

[4] McDonnell *v.* White, 11 H. L. Rep., 570; Hollier *v.* Hedges, 2 Ir. Ch., N. S., 370. As to the power of a court of equity to abate rent reserved on a lease made before the receivership over the lessor's estate, see Harrison *v.* Fitzgerald, Ir. Rep., 10 Eq., 394. As to the apportionment of rent between that part of the premises over which the receiver is continued and that part as to which he is discharged, when he is discharged as to a part before the termination of the entire receivership, see Beechey *v.* Smyth, 11 L. R., Ir., 88.

[5] Hollier *v.* Hedges, 2 Ir. Ch., N. S., 370.

over the property of a judgment debtor, upon the application of his creditors, the debtor is not entitled to interfere with the receipt of rents after the order of appointment is made absolute.[1] So where, as under the Irish practice, the functions of a receiver of rents and profits of real property have reference, not only to the future rents, but to rents already due and in arrears, a trustee, previously charged with the management of the estate, will not be held responsible for arrearages of rent at the date of appointment, since all control over and power of collecting them are taken away from the trustee by the appointment of the receiver.[2]

§ 620. When a motion was made that tenants of a portion of the real estate in controversy be required to attorn to the receiver, and to pay him their arrears of rent, which was opposed by the tenants upon the ground that an action had been brought against them to recover the rent, which was still pending, and that if such action should be sustained they would, by attorning, subject themselves to payment of the arrears twice over, the motion was ordered to stand over until the action was tried. And the action being tried and plaintiffs being nonsuited, the motion to compel the tenants to attorn was allowed. But, under the English practice, costs were not allowed against the tenants on granting such a motion.[3]

§ 621. The service of an order of court upon tenants, requiring them to pay their rents to the receiver appointed in the cause, attaches all rents then in their hands, and all thereafter to become due. And until such order is revoked, or set aside by an order discharging the receiver, the tenant can not rightfully pay rent to any person other than the receiver, and the death of the receiver will not justify the tenant in paying any other person before the appointment of another receiver.[4] But when tenants have paid rent

[1] M'Loughlin *v.* Longan, 4 Ir. Eq., 325.

[2] McDonnell *v.* White, 11 H. L. Rep., 570.

[3] Hobhouse *v.* Hollcombe, 2 De G. & Sm., 208.

[4] Russell *v.* Baker, 1 Hog., 180.

properly due the receiver to a third person, he having no authority or right to receive it, it will be treated as paid to such person for the receiver, and the party entitled thereto, under the first appointment of the receiver, will be allowed the money, although the receiver has been subsequently extended in behalf of another creditor.[1]

§ 622. As regards the receiver's right to distrain for unpaid rent, it is difficult to deduce any settled rule from the decided cases, and the decisions are far from harmonious upon this subject. Thus, it has been held, when the tenant has already attorned to the receiver, that he may distrain without obtaining leave of court for that purpose.[2] And it has been held, generally, that a receiver may distrain whenever he deems it necessary, without applying for leave of court, since this would in many cases afford the tenant an opportunity to remove his goods from the premises before the order could be obtained.[3] Again, it is said that the receiver may distrain at his own discretion for rent in arrear within the year, but if in arrear more than a year, he should obtain an order of court before distraining.[4] If, however, there is doubt as to who has the legal right to the rent in question, the receiver should obtain an order of court before proceeding, since he must distrain in the name of the person having the legal right.[5] When permission is given the receiver to distrain, it is regarded as indefinite in its operation, and not confined to any particular act or time.[6] And it is not necessary that the receiver should first procure the discharge of an order to distrain against tenants, before moving the court for leave to proceed in ejectment against the tenants for non-payment of rent.[7]

§ 623. When plaintiff, after procuring the appointment of a receiver in equity, still proceeds by action at law con-

[1] O'Callaghan *v.* O'Callaghan, 3 Ir. Ch., N. S., 376.

[2] Raincock *v.* Simpson, cited in note to Shelly *v.* Pelham, Dick., 120.

[3] Pitt *v.* Snowden, 3 Atk., 750.

[4] Brandon *v.* Brandon, 5 Madd., 473, 1st American Edition, 287.

[5] Pitt *v.* Snowden, 3 Atk., 750.

[6] Anonymous, 1 Hog., 335.

[7] Sturgeon *v.* Douglas, 1 Hog., 400.

cerning the same subject-matter, and the receiver takes no steps to restrain him from so doing, the latter will not be granted leave to distrain for rent due from the premises subject to his receivership. But upon plaintiff undertaking to proceed no further with his action at law, the receiver's application for leave to distrain may be properly granted.[1]

§ 624. As a general rule, to entitle a receiver to sue for and recover rents accruing from property of a debtor over whose estate he is appointed, he must give notice of his appointment to the tenant, and without such notice he can not maintain an action for the rent. The object of the notice is of a twofold nature: first, to protect the estate from payment to the wrong person, and second, to prevent the tenant from dealing with the former owner in ignorance of the receiver's appointment.[2]

§ 625. The proper method of enforcing obedience to an order of court directing a tenant to pay rent to the receiver is by attachment. And upon the refusal or neglect of a tenant to comply with such order, an attachment may issue to compel obedience to the mandate of the court.[3] But before an attachment will issue against a tenant for non-payment of rent to the receiver, it should appear that he has been served with an order requiring him to make such payment.[4] If, however, the tenant has once paid his rent to the receiver, a personal demand by the receiver of the rent due is not necessary to lay the foundation for an attachment against the tenant for non-payment, and a demand by letter or by a third person is sufficient.[5] And when, after appearance in the action or matter in which the receiver was appointed, a party to the cause interferes with the rents due the receiver, an order for an attachment against the person thus interfering may be made absolute in the first instance.[6]

§ 626. When the receiver has obtained an order for an

[1] Mills *v.* Fry, 19 Ves., 277; S. C., Coop., 107.

[2] Hunt *v.* Wolfe, 2 Daly, 298.

[3] Armstrong *v.* Southwell, 1 Ir. Eq., 32.

[4] Pope *v.* Pope, 2 Hog., 335.

[5] Brown *v.* O'Connor, 2 Hog., 77.

[6] Thomas *v.* Thomas, Flan. & K., 621.

attachment against a tenant for non-payment of rent, this order must be discharged before the receiver can be allowed to proceed by distress for the collection of the rent.[1] So when the receiver has first proceeded by distraint, the order to distrain must be discharged before he will be allowed to attach.[2]

§ 627. The court will not by a proceeding for attachment against a tenant, for not paying rent to the receiver, determine the rights of a third person, not a party to the cause, to whom the tenant has paid his rent.[3] And when a person has been in possession of premises, paying rent therefor to a receiver for several years, and afterward disputes his liability to pay the receiver, on the ground of holding under another title, the receiver should not proceed by attachment against the tenant, since a question of disputed title can not be tried by an attachment for contempt, but must be tried in an action at law for that purpose.[4] And when a receiver has received rent from an assignee of the tenant, he can not attach the tenant himself for non-payment, his only remedy against him being by proceedings at law.[5] Nor will the court issue an attachment against a party to the cause, for non-payment of rent to the receiver, pending the total abatement of the suit by the death of the sole plaintiff.[6]

§ 628. Where, in an action to determine the right to certain real property, a receiver of the rents and profits has been appointed, and he is authorized by the court to permit the defendant to collect the rents until further order, upon giving bond with satisfactory surety for payment to the receiver of all rents collected by him, such order will be construed as merely regulating the receiver's conduct, without affecting the rights of the parties. The fund is regarded as being still under control of the court as much as before, the receiver collecting the rents by proxy instead of in per-

[1] Nugent *v.* Nugent, 1 Hog., 169.

[2] Eyre *v.* Eyre, 1 Hog., 252.

[3] Nason *v.* Blennerhassett, 1 Hog., 402.

[4] Pread *v.* Lewis, 2 Mol., 369.

[5] Cane *v.* Bloomfield, 1 Hog., 345.

[6] Brennan *v.* Kenny, 2 Ir. Ch., N. S., 579.

son, and defendant being simply the receiver's agent, for the benefit of the fund under control of the court. An appeal, therefore, will not lie from such an order, since it does not affect the rights of the parties.[1]

§ 629. A receiver over real property should not retain the money arising from rents, but should move to have it laid out and invested for the benefit of the parties entitled thereto.[2] But when a receiver is appointed of the rents and profits of real estate *pendente lite*, the court will not usually order him to pay over or account for the rents to a person claiming them, when the land itself is not charged with payment of the demand. And claimants must, therefore, to entitle themselves to the rents and profits at the receiver's hands, show that they had a right to proceed against the land itself for satisfaction of their demands.[3]

§ 630. In New Jersey, it is held that the statute authorizing the appointment of receivers over insolvent corporations, and the appointment under the statute, operate as a conveyance of all the corporate property to the receiver, for the benefit of creditors, and to be distributed in accordance with the statute. It is held, therefore, that rents accruing from the corporate property subsequent to its sale by the receivers belong to the purchaser at such sale, while rents accruing after the appointment and before the sale belong to the receivers, for the benefit of creditors of the corporation.[4]

§ 631. When a receiver of the rents accruing from real property has been appointed, and a decree is subsequently made for a sale of the premises, the receiver will be continued until the conveyances are executed, in order to collect

[1] Garr *v.* Hill, 1 Halst. Ch., 639.

[2] Foster *v.* Foster, 2 Bro. C. C., 616. See, as to liability of a receiver of rents and profits of realty to account, who has been appointed by agreement of the parties, Ford *v.* Rackham, 17 Beav., 485.

[3] City of Baltimore *v.* Chase, 2 G. & J., 376.

[4] Corrigan *v.* Trenton Delaware Falls Co., 3 Halst. Ch., 489. See, also, Fish *v.* Potts, 4 Halst. Ch., 277, affirmed on appeal, id., 909, upon the question of rents in such case.

arrears of rent, and the tenants will be compelled to pay arrears to the receiver.[1]

§ 632. The primary duty of a receiver of leasehold premises is to pay the head-rent, or principal rent due to the landlord of the premises, and this he is bound to do without any special order of court to that effect, and without compelling the landlord to resort to any proceedings for the purpose of enforcing payment.[2]

§ 633. Upon the question of the receiver's right to make repairs, after recovery of the premises in ejectment, it has been held unnecessary for him to first apply for leave of court to expend a part of the fund in his hands for repairs, prior to letting the premises; but that he is warranted in the first instance in laying out what he may deem necessary for repairs, and his disbursements, if reasonable and proper, will be allowed in passing his accounts.[3] But in an early English case, upon a bill by an administrator against a tenant for life, praying a decree that the tenant for life in possession should repair the premises, or that a receiver be appointed with directions to repair, the master of the rolls refused the relief on the ground that there was no precedent for such an exercise of jurisdiction.[4]

§ 634. Under the Irish chancery practice, the appropriate course for a receiver to adopt, when waste is committed on lands subject to his control, is to apply to the court for a reference to a master, to inquire and report what proceedings shall be taken by the receiver touching the waste. Or, if the case is so pressing as to admit of no delay, he may file a bill for an injunction to stay waste, and, at the same time with moving for the injunction, he may move for a reference to a master to inquire and report whether it is necessary that he should have adopted that proceeding, and whether it shall be continued.[5] And the court may, upon

[1] Quin *v.* Holland, Ca. *temp.* H., 295.

[2] Balfe *v.* Blake, 1 Ir. Ch., N. S., 365; Walsh *v.* Walsh, 1 Ir. Eq., 209.

[3] Macartney *v.* Walsh, Hayes, 29, note b.

[4] Wood *v.* Gaynon, Amb., 395.

[5] Mangle *v.* Lord Fingall, 1 Hog., 142.

the receiver's motion, grant a conditional order restraining tenants from committing waste, without requiring a bill to be filed for that purpose, leaving the case to be decided upon showing cause against the order.[1]

§ 635. When a receiver is in possession of real estate under and by virtue of his appointment, and proceedings are instituted in another court by parties claiming a lien upon the property, the court appointing the receiver will entertain a bill filed by him for leave to sell the real estate free from all liens claimed by other parties, and to have so much of the proceeds of the sale set apart as shall be sufficient to pay the alleged liens, if they are finally sustained.[2] But when a receiver is appointed over real estate in an action for the rescission of a contract, it is improper to authorize him to sell any part of the property in controversy for the benefit of plaintiff, before a final hearing upon the merits.[3] A purchaser, however, from a receiver, who has given his note for the purchase money, having received and retained possession under the receiver's deed, can not, in the absence of fraud or mistake, deny the validity of the receiver's appointment, in an action brought against him to enforce a vendor's lien for the unpaid purchase money.[4]

§ 636. As regards the rights acquired by a purchaser of real property at a receiver's sale under order of court, it is sufficient for the purchaser to see that there was a suit in which the court appointed a receiver of the property; that

[1] Cronin *v.* McCarthy, Flan. & K., 49.

[2] De Visser *v.* Blackstone, 6 Blatchf., 235.

[3] Esterlund *v.* Dye, 56 Ga., 284. Under the New York statute authorizing a receiver in an action by a wife for divorce, it is held that the receiver acquires no title to property of the defendant, but is only entitled to possession as against the defendant and all persons claiming under him. And while his right to possession and to receive the rents remains unquestioned, he has no concern with the legal title and can not maintain a suit to set aside a conveyance alleged to have been fraudulently made by the husband after the receiver was appointed, or to set aside an alleged fraudulent assignment by the husband of a mortgage received upon such conveyance, or to restrain the foreclosure of such mortgage. Foster *v.* Townshend, 68 N. Y., 203.

[4] Stelzer *v.* La Rose, 79 Ind., 435.

he was authorized by the court to sell, and that he sold in pursuance of such authority; that the sale was confirmed by the court, and that the deed accurately recites the property sold. The title then passes to the purchaser, and he is not bound to inquire whether any errors occurred in the action of the court, or whether there were any irregularities in the action of the receiver.[1] The court having properly acquired jurisdiction of the subject-matter, and having ordered its receiver to sell the real estate, no mere errors or irregularities in the exercise of the jurisdiction thus acquired can affect the title of a purchaser from the receiver, in a collateral proceeding. Thus, when a bill is filed in behalf of creditors against an administrator to establish a lien upon the estate of the deceased, and on this bill a decree is had adjusting and fixing the rights of the creditors, removing the administrator and appointing a receiver to wind up the estate, the court has full jurisdiction to order its receiver to

[1] Koontz *v.* Northern Bank, 16 Wal., 196. "A purchaser under a deed from a receiver," say the court, Mr. Justice Field delivering the opinion, "is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by order of the court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process. If the receiver in the one case, or the sheriff in the other, omit to perform his whole duty, by which the parties are injured, or commit any fraud upon the court, and the rights of third parties have so far intervened as to prevent the court from setting the proceedings aside, the injured parties must seek their remedy personally against those officers, or on their official bonds. The interest of parties in the controversy will generally induce such attention to the proceedings as to prevent great irregularities from occurring, without being brought to the notice of the court."

sell the realty, and his deed in pursuance of such order will convey a good title. The court, in such case, having properly acquired jurisdiction for the purpose of settling the administration of the estate, retains its jurisdiction until the matter is fully and properly adjusted and the property sold.[1]

§ 637. In case of the appointment of a receiver over premises which are held by a tenant under a lease, with covenants against the use of the demised premises for a particular purpose, as for a shop, on pain of forfeiting the lease for a breach of the covenants, the receiver is entitled to the aid of an injunction to restrain the tenant from using the premises for the forbidden purpose.[2]

§ 638. It is a common practice for receivers in charge of real property, to apply to the court for leave to lease the premises under their control. And when an order is sought authorizing the receiver to let the property, it must be clearly shown who is in the actual possession, since otherwise a party in possession might be ejected without notice.[3] But a receiver will not be permitted to make a lease of real estate which will bind an infant remainder-man.[4]

§ 638 *a*. When receivers enter into possession of and receive the rents of real estate belonging to third persons not parties to the cause, but which had been held by defendants under lease, they may be required by petition in the cause in which they were appointed to pay to the owners the rent due thereon. They may also be required, upon like petition, to reimburse such owners for dilapidations to the property, the lease requiring the lessee to keep the premises in the condition in which they were demised.[5]

[1] Walker *v.* Morris, 14 Ga., 323.

[2] Mason *v.* Mason, Flan. & K., 429.

[3] Sealy *v.* Munns, 1 Ir. Eq., 332.

[4] Gibbins *v.* Howell, 3 Madd., 1st American edition, 242.

[5] Neate *v.* Pink, 3 Mac. & G., 476, affirming S. C., 15 Sim., 450. But see Brocklebank *v.* East London Railway, 12 Ch. D., 839.

CHAPTER XV.

OF RECEIVERS IN CASES OF MORTGAGES.

I. PRINCIPLES GOVERNING THE RELIEF.

§ 639. The jurisdiction of equity by the appointment of receivers over mortgaged premises, for the protection of mortgagees, or in aid of actions for the foreclosure of mortgages, is well established, and has long been exercised by courts of equity, both in England and in America. It is, however, exercised with extreme caution, and the relief will not be allowed when other adequate remedy exists, and when no imperative reasons are shown for this extraordinary species of relief.[1] Stated in general terms, the rule is, that in actions for the foreclosure of mortgages, equity will not interfere by the appointment of a receiver unless it is clearly shown that the security is inadequate, or that there is

[1] Morrison *v.* Buckner, Hemp., 442. As to the right to a receiver in an action to foreclose a mortgage under the statutes of Indiana, and as to the extent of the receivership and the practice and procedure, see Hursh *v.* Hursh, 99 Ind., 500. As to the right of a mortgagee to a receiver of the rents and income of the mortgaged premises under the Kentucky code, see Douglass *v.* Cline, 12 Bush, 608; Woolley *v.* Holt, 14 Bush, 788.

imminent danger of the waste, destruction, or removal of the property. And there must, in all cases, be a strong, special ground for the relief shown.[1] In other words, the courts do not interfere by a receiver as a matter of course in aid of foreclosure proceedings, when it is not alleged that there will be any deficiency, and when plaintiff is at liberty to obtain a decree of sale.[2] When the mortgagor is the holder of the legal title and entitled to the possession of the mortgaged premises, his possession under the legal estate will not be disturbed by the appointment of a receiver, except in a clear case of fraud, or of great danger to the rights of the mortgagee if the estate is not taken under the protection of the court. And the court will not interfere in behalf of the mortgagee, unless it clearly appears to be its duty to take charge of the estate to protect a "clear, strong claim against it." If, therefore, doubt exists as to the amount actually due under the mortgage, and the plaintiff's allegations of the inadequacy of the security are denied by the answer, the court will not interfere with the mortgagor's possession.[3]

§ 640. Under the practice in the English Court of Chancery, a distinction was always observed, in the appointment of receivers, between legal and equitable mortgages, the former vesting the legal estate at once in the mortgagee, with the right of immediate entry, and the latter conveying no legal title, but a mere equity. And while, as will hereafter be shown, the jurisdiction has been frequently exercised in behalf of equitable mortgagees,[4] as, for example, in behalf of subsequent mortgagees where there are several incumbrancers, all subsequent to the first being regarded,

[1] Morrison v. Buckner, Hemp., 442; Callanan v. Shaw, 19 Iowa, 183.

[2] Hackett v. Snow, 10 Ir. Eq., 220.

[3] Callanan v. Shaw, 19 Iowa, 183. And in this case, grave doubts are intimated as to whether, in any case, a receiver should be allowed to take possession of the mortgagor's homestead, pending proceedings for the foreclosure of a mortgage thereon.

[4] See Meaden v. Sealey, 6 Hare, 620.

under the English system, as equitable mortgagees, yet the rule is well settled that a legal mortgagee, *i. e.*, one having the legal estate with an immediate right of entry, is not entitled to the aid of equity by the appointment of a receiver.[1] The reason for the rule, as stated by Lord Eldon, by whom it was first firmly established, is found in the fact that the legal mortgagee, being entitled to immediate possession, stands in no need of the aid of equity, since he can at once protect his interests by himself taking possession.[2] Nor does the fact that the tenants of the mortgaged premises are numerous, and that there is difficulty in collecting the rents, vary the application of the rule, and the mortgagee, in such case, will still be left to his remedy by taking possession.[3] The English doctrine has been recognized, although not generally followed, in this country, and it has been held, on a bill to foreclose a legal mortgage and for an injunction and a receiver to prevent the defendant from receiving the rents, that equity will not interfere as against the mortgagor in possession, such interference being regarded as inconsistent with the established practice of courts of equity.[4]

§ 641. While, as we have thus seen, a mortgagee in England, having the legal estate, is not entitled to the intervention of equity by the appointment of a receiver in aid of his foreclosure suit, since he is usually in a position to take possession himself, without the aid of the court, yet if he is unable to take possession, the reason for the rule fails, and he may, in such case, be entitled to the relief. Thus, in the case of a mortgage executed by one as surety to the original indebtedness, in addition to the mortgage given by the principal debtor himself, and providing that the mortgagee shall not have recourse to the surety's estate until the estate

[1] Berney *v.* Sewell, 1 Jac. & W., 647; Ackland *v.* Gravener, 31 Beav., 482; Sturch *v.* Young, 5 Beav., 557.

[2] See observations of Lord Eldon in Berney *v.* Sewell, 1 Jac. & W., 647. See, also, observations of Lord Romilly, Master of the Rolls, to the same effect, in Ackland *v.* Gravener, 31 Beav., 482.

[3] Sturch *v.* Young, 5 Beav., 557.

[4] Oliver *v.* Decatur, 4 Cranch C. C., 458.

primarily charged shall prove an insufficient security, in an action for a foreclosure by the mortgagee, a receiver may be appointed over the surety's estate.[1] So when the mortgagee is forcibly prevented by the mortgagor from taking possession after default in the payment of principal and interest, the mortgagee is entitled to a receiver.[2] And when a deed of trust, in the nature of a mortgage, authorizes the trustee to take possession of the mortgaged premises upon default in the payment of principal and interest, upon such default and the refusal of the trustee to take possession at the request of the bondholders secured by the mortgage, a court of equity may appoint a receiver upon a bill by the bondholders. And in such case, the relief may be granted to enforce the right to immediate possession of the mortgaged premises, independent of any question of loss or depreciation of the property.[3]

§ 641 *a*. Under the statutes of Michigan, it is held that

[1] Ackland *v.* Gravener, 31 Beav., 482. Lord Romilly, Master of the Rolls, observes, p. 484: "I must grant the receiver in this case, which is a peculiar one. The rule undoubtedly is, that where a mortgagee files a bill to foreclose, if he has a legal estate and can take possession at once by ejectment, this court will not grant him a receiver, and for this plain reason: that he may, if he think fit, take possession without the help of the court. It is true that, by taking possession as mortgagee, he is subject to have the account taken against him with a greater degree of severity than any other case, but he is not to gain the advantage of having a receiver when he can take possession himself, though subject to all the inconveniences which arise from exercising that power. But, though the court refuses to grant the receiver in cases where there is no question and the mortgagee can take possession at once, there being no defense whatever to his action of ejectment, still, if the mortgagee can not take possession, as if, for instance, there is a prior mortgagee who refuses to take possession, then, at the instance of the second mortgagee, the court does grant a receiver. In this instance, the case is peculiar, for, though I think the legal estate is in the plaintiff by the terms of the deed, yet it contains a proviso that the plaintiff shall not have recourse to the surety's estate, or be at liberty to sell it, until the estate primarily charged shall prove an insufficient security."

[2] Truman *v.* Redgrave, 18 Ch. D., 547.

[3] Warner *v.* Rising Fawn Iron Co., 3 Woods, 514.

the mortgagor is entitled absolutely to possession until the mortgagee's title under the foreclosure becomes absolute. It is, therefore, held that the mortgagee is not entitled to the rents pending a foreclosure, or to a receiver to collect such rents.[1] And when the mortgagee sells under a power of sale contained in the mortgage and becomes the purchaser, upon a bill by him to remove uncertainties as to his title and for a confirmation of the sale, he can not have a receiver of the rents and profits, the suit being in the nature of an action to remove a cloud from the title, and the mortgagee having a remedy at law to recover possession.[2] So when the mortgage provides in express terms that the mortgagor shall retain possession until foreclosure, it is error to appoint a receiver in behalf of the mortgagee in a suit to foreclose, as the consideration for a continuance of the cause requested by defendant, when it is not shown that the relief is necessary for the preservation of the property.[3]

§ 642. As regards the rents and profits of mortgaged premises, pending an action for a foreclosure, the general rule, in the absence of any especial equities, is, that the mortgagee, as against the mortgagor in possession and those deriving title under him subsequent to the mortgage, is not entitled to a receiver of the rents and profits *pendente lite*, and a court of equity will usually leave the mortgagee to his action at law to recover possession, and for the rents and profits.[4] Where, therefore, the mortgaged premises are an adequate security for the payment of the indebtedness, there is no ground for the appointment of a receiver of the rents and profits. And in determining as to the adequacy of the security for the purposes of an application for a receiver of the rents, the best criterion as to the value of the security would seem to be the rental itself.[5] It is to be

[1] Wagar *v.* Stone, 36 Mich., 364; Hazeltine *v.* Granger, 44 Mich., 503. See, also, Beecher *v.* M. & P. R. M. Co., 40 Mich., 307.

[2] McLean *v.* Presley's Administrator, 56 Ala., 211.

[3] Chadbourn *v.* Henderson, 2 Baxter, 460.

[4] Williams *v.* Robinson, 16 Conn., 517.

[5] Shotwell *v.* Smith, 3 Edw. Ch., 588.

observed, also, that a receiver will not be appointed of the rents and profits when the mortgage indebtedness is not yet due, and when the mortgagee has neglected to take a pledge of the rents and profits of the whole premises to keep down the accruing interest.[1] So the mortgagee is not entitled to rents which have been collected by a receiver in another suit, notwithstanding he may have given notice to the tenants of the receiver to attorn to him.[2] And when the mortgagee files a general creditor's bill, for the benefit of himself and other creditors, but does not set up his mortgage or seek its foreclosure, and a receiver is appointed, but the bill is afterward dismissed, the mortgagee is not entitled to the rents collected by such receiver, even though he afterward files his bill for a foreclosure.[3]

§ 643. But when the mortgage is actually due, and the proceeds of the mortgaged premises are not likely to prove sufficient for the payment of the debt and costs, and the mortgagor or other person who is personally liable for the deficiency is insolvent, the mortgagee may apply for a receiver to secure the rents and profits which have not yet been collected. And in this way he may obtain a specific lien upon the rents to pay such deficiency.[4] When, therefore, a mortgagee, upon proceedings for a foreclosure, obtains a receiver of the rents and profits, if the amount obtained upon a sale of the premises proves insufficient to pay the mortgage indebtedness, he is entitled to as much of the rents in the receiver's hands as will make up the deficiency. And this is so, even though the mortgagor's rights in the premises have passed to his assignee in bankruptcy, and have been sold by him; since the mortgagee, who procures a receiver to be appointed for the protection of his lien, is entitled to the rents in preference to the assignee or

[1] Bank of Ogdensburgh *v.* Arnold, 5 Paige, 38.

[2] Coddington *v.* Bispham, 36 N. J. Eq., 574.

[3] Scott *v.* Ware, 65 Ala., 174.

[4] Astor *v.* Turner, 11 Paige, 436. See, also, Post *v.* Dorr, 4 Edw. Ch., 412; Lofsky *v.* Maujer, 3 Sandf. Ch., 69.

purchaser at his sale.[1] But as regards past-due rents, the receiver only acquires title to such as remain unpaid at the time of his appointment, and he is not entitled to rents which have been collected by an assignee in bankruptcy of the mortgagor prior to the receivership.[2] And a mortgagee who procures a receiver in aid of his foreclosure proceeding, thereby acquires only an equitable lien upon the unpaid rents. Until such appointment, the owner of the equity of redemption is entitled to receive the rents and can not be compelled to account for them, even though the motion for a receiver is pending when such rents are collected.[3] But in an action brought by the receiver to recover rents, the inadequacy of the mortgage security and the default in payment of the mortgage indebtedness can not be questioned by defendant, he having been a party to the suit in which the receiver was appointed, and such issues having been determined in that suit they will be regarded as *res judicata*.[4]

§ 644. The lien thus obtained by a mortgagee who uses the necessary diligence in the assertion of his rights is not confined to the rents actually paid. And when, upon the maturing of the indebtedness, the security being inadequate, the mortgagee files his bill for a foreclosure, and procures the appointment of a receiver, he thereby obtains an equitable lien upon the unpaid rents, and will be entitled thereto to the extent of any deficiency in the security. For example, when the mortgagor, previous to the foreclosure suit and the appointment of a receiver, conveys the premises subject to the mortgage, and his grantee rents a portion of the premises, receiving a note, secured by chattel mortgage, for the rent, the receiver in the foreclosure suit is entitled

[1] Post *v.* Dorr, 4 Edw. Ch., 412.

[2] Rider *v.* Vrooman, 12 Hun, 299.

[3] Rider *v.* Bagley, 84 N. Y., 461. As to the right of a receiver in foreclosure proceedings to lease the mortgaged premises and as to the duration of such leases, see Shreve *v.* Hankinson, 34 N. J. Eq., 413.

[4] Goodhue *v.* Daniels, 54 Iowa, 19.

to the sum secured by the chattel mortgage, it being subject to the equitable lien acquired by the mortgagee.[1]

§ 645. Upon the question of the liability for loss of rents and profits after they have come to the hands of the receiver, it was intimated, although not decided, in a case before Lord Thurlow, that if a receiver is appointed upon the application of a mortgagee or other incumbrancer, and he afterward embezzles or otherwise wastes the rents and profits, the loss should fall upon the mortgagor.[2]

§ 646. A mortgagee of a growing crop, or his assignee, although he may not be authorized to appropriate the property to himself, is nevertheless entitled to have it protected, and may, therefore, have a receiver of the crop pending litigation concerning his rights under the lien claimed by him.[3] But when a receiver is appointed in behalf of a mortgagee to manage the mortgaged estate and receive the rents and profits, he is not entitled, by virtue of his appointment, to the proceeds of crops raised upon the premises which have been severed by him and consigned to parties from whom he had received advances, the crops having been removed and consigned by the mortgagor before the receiver was appointed.[4] So the mortgagor in possession is entitled to crops grown upon the premises, and if such crops are sold upon execution against him before a receiver is appointed in the foreclosure suit, the receiver acquires no title thereto as against the purchaser.[5] And where parties agree to become sureties for a defaulting debtor, upon being secured for their liability by his conveying to them certain real estate in trust, with a covenant that the crops and produce of the property shall be consigned to them for a term of

[1] Lofsky *v.* Maujer, 3 Sandf. Ch., 69. As to the right of a mortgagee, through a receiver, to the rents collected by the mortgagor pending the foreclosure suit and before decree, see Silverman *v.* Northwestern Mutual Life Insurance Company, 5 Bradw., 124.

[2] See observations of Lord Thurlow in Rigge *v.* Bowater, 3 Bro. C. C., 365.

[3] Simpson *v.* Robert, 35 Ga., 180.

[4] Codrington *v.* Johnstone, 1 Beav., 520.

[5] Favorite *v.* Deardoff, 84 Ind., 555.

years after the reimbursement of what they may advance as sureties, upon a bill filed against the sureties for an accounting, a receiver will not be appointed when it is not shown that defendants have made any oppressive use of the deed.[1] But when the mortgage covers the rents, issues and profits of the premises, and a receiver is appointed upon the ground of insolvency of the mortgagor and inadequacy of the security, and the receiver grows and harvests a crop upon the premises, the proceeds of the sale of such crop may be applied in payment of a deficiency due to the mortgagee, the proceeds of the foreclosure sale having been insufficient to satisfy the indebtedness.[2]

§ 647. When a mortgagee of chattels, who is in possession, having sold a part and occupying as to the residue the position of trustee for other creditors, is about to dispose of the residue to the prejudice of a judgment creditor of the mortgagor, a receiver may be appointed of the proceeds of the remaining property for the better protection of the rights of all parties in interest.[3] And a receiver has been allowed in behalf of a mortgagee of chattels which have been seized under writs of attachment which were subordinate to the lien of the mortgage, the relief being necessary for the prevention of waste and loss until the rights of all parties could be determined.[4] But a receiver will not be appointed in behalf of a mortgagor of chattels, to take charge of the property in the hands of the mortgagee, merely on the ground of the mortgagor's apprehension that defendant may part with the property to a *bona fide* purchaser, when he himself admits an indebtedness to be still due to the mortgagee.[5] And in a suit by a judgment creditor to set aside a mortgage executed by his debtor upon a stock of goods, upon the ground that it was intended to

[1] Bunbury *v.* Winter, 1 Jac. & W., 255.

[2] Montgomery *v.* Merrill, 65 Cal., 432.

[3] Gouthwaite *v.* Rippon, 8 L. J., N. S. Ch., 139.

[4] Crow *v.* Red River County Bank, 52 Tex., 362.

[5] Bayaud *v.* Fellows, 28 Barb., 451.

defraud creditors, if the fraud is denied by defendants a receiver will not be appointed *in limine*, when it is not shown that the mortgagee is insolvent or unable to respond in case the mortgage shall finally be declared invalid.[1] So when plaintiff sues to establish his interest in personal property covered by a mortgage and for a sale of the property, it is not error to refuse a receiver when defendants deposit in court a sufficient amount to secure plaintiff in whatever judgment he may obtain against them.[2]

§ 648. It is not essential to the exercise of the power of equity by the appointment of receivers over mortgaged property, that the property itself should be within the jurisdiction of the court, and receivers have been appointed, in proper cases, although the mortgaged estates were in a foreign country.[3] Thus, a mortgagee of West Indian estates was appointed in England receiver of the property, and without requiring the usual security for the faithful performance of his trust.[4] But the court will not interfere, in this class of cases, when the parties in interest, and who really represent the mortgaged property in the foreign country, are not before the court or within its jurisdiction.[5]

§ 649. It would seem that the aid of a receiver for the protection of a mortgagee is not limited to cases where it is necessary for the security of the principal sum due, but may, in certain cases, be allowed for the purpose of securing

[1] Rheinstein *v.* Bixby, 92 N. C., 307.

[2] Welch *v.* Henry, 32 Kan., 425. As to the right of a mortgagee of chattels to a receiver under the statutes of Iowa, and as to the circumstances which will warrant the relief, see Maish *v.* Bird, 59 Iowa, 307. In Merchants and Manufacturers National Bank *v.* Kent, Circuit Judge, 43 Mich., 292, it is held that when a receiver is allowed over personal property in a suit to foreclose a chattel mortgage, a third person, not a party to the cause, having a right of action in replevin to recover the property, should not be restricted by the court to suing in trover, but should be permitted to proceed with his action of replevin.

[3] Davis *v.* Barrett, 13 L. J., N. S. Ch., 304; Langford *v.* Langford, 5 L. J., N. S. Ch., 60.

[4] Davis *v.* Barrett, 13 L. J., N. S. Ch., 304.

[5] Shaw *v.* Shore, 5 L. J., N. S. Ch., 79.

the interest as well. Thus, a mortgagee has been allowed a receiver to keep down the interest on his mortgage, although not entitled to a foreclosure, he having covenanted with the mortgagor that the principal of the indebtedness should not be called in until after the mortgagor's death.[1] With regard to payments of interest to a mortgagee by a receiver appointed at his instance, such payments are treated as having been made by the mortgagor himself; since the receiver, although an officer of the court, is not a stranger to the mortgagor, and may be regarded as his agent to the extent of making such payments of interest due.[2]

§ 650. It is also to be noticed, with reference to the position and functions of a receiver appointed in aid of an action of foreclosure, that he represents, not merely the mortgagees in whose behalf he may have been appointed, but is equally the representative of all parties in interest. And when the mortgagor, a corporate body, has been thrown into bankruptcy, pending the proceedings for a foreclosure in which the receiver was appointed, the receiver is to be deemed as much the representative of the assignees in bankruptcy and the creditors and shareholders of the corporation, as of the mortgagees themselves. The court will not, therefore, order a sale of the property which would be in hostility to and would dispose of the rights of those interested in the equity of redemption, since such a sale would be directly hostile to the rights of the receiver who holds possession for them.[3]

§ 651. Again, when the person selected for the office of receiver also occupies other and different relations toward the mortgaged property, his functions and duties as receiver are considered as paramount to all others. For example, when

[1] Burrowes *v.* Molloy, 2 Jo. & Lat., 521; S. C., 8 Ir. Eq., 482. And see Newman *v.* Newman, cited in 2 Bro. C. C., 92, note 6.

[2] Chinnery *v.* Evans, 11 H. L. Rep., 115.

[3] Sutherland *v.* Lake Superior Ship Canal R. & I. Co., 9 Bank. Reg., 307. As to the right to the rents of mortgaged premises as between a receiver in a foreclosure suit and an assignee in bankruptcy of the mortgagor, see Hayes *v.* Dickinson, 9 Hun, 277.

a mortgagee of property, occupying the position of a trustee of the equity of redemption, is also appointed receiver of the mortgaged premises and accepts of the trust, his relations and interest as mortgagee will not be permitted to interfere with his duties as receiver, nor with the purposes or interests for which he was appointed. In such case, it is his plain duty as receiver to increase the surplus revenues of the property, beyond what may be found due to him as mortgagee, by obtaining the largest possible rental. And upon his application to the court for authority to lease the mortgaged premises, it is his duty to lay before the court all the information within his possession, or which by reasonable diligence he might acquire, as to the situation and value of the property. And when he has been ordered by the court, upon his own application, to lease the premises to a particular person, but it is afterward apparent that the application was not made by him in good faith, and that he was controlled by a motive and purpose inconsistent with his duties as receiver, the order will be reversed.[1]

§ 652. There are some cases to be met with in the English reports, where the mortgagor has covenanted with and authorized the mortgagee to appoint a receiver, in case of default, of the rents and proceeds of the mortgage estate, for the better security of the mortgage debt and the interest thereon, and where the mortgagor has attorned to the receiver thus appointed.[2] In such cases, it would seem that the receiver, being appointed by the mortgagee under the power contained in the mortgage, is in possession of the premises as agent, not of the mortgagee, but of the mortgagor; since the mortgagee himself acts in the capacity and sustains the relation of agent of the mortgagor in making the appointment.[3] And where the mortgagor attorns to

[1] Bolles *v.* Duff, 54 Barb., 215; S. C., 37 How. Pr., 162.

[2] See Jolly *v.* Arbuthnot, 4 DeG. & J., 224; Jefferys *v.* Dickson, L. R., 1 Ch. App., 183; Law *v.* Glenn, L. R., 2 Ch. App., 634.

[3] See opinion of Rolt, L. J., in Law *v.* Glenn, L. R., 2 Ch. App., 634; Jefferys *v.* Dickson, L. R., 1 Ch. App., 183.

the receiver, the relation of landlord and tenant would seem to be established between them.[1] The practice of thus providing in the mortgage itself for a receiver, in case of default by the mortgagor, seems to have been quite prevalent in England, and doubtless gave rise to the important statute of 23d and 24th Victoria, which provides that mortgagees may have receivers of the mortgaged premises in all cases when the payment of principal is in arrear one year, or the interest six months, or after any omission to pay any premium or insurance due upon the property. The receiver thus appointed is deemed the agent of the person entitled to the property subject to the mortgage, who is solely responsible for his conduct, and the statute regulates the manner of appointment and removal, as well as the various functions and duties of this class of receivers.[2]

[1] Jefferys *v.* Dickson, L. R., 1 Ch. App., 183.

[2] This important statute, 23 & 24 Victoria, ch. CXLV. (August 28, 1860), 100 English Statutes at Large, p. 782, provides as follows:

"XI. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more), as if they had been in terms conferred by the person creating the charge, namely: . .

"3d. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned. . .

"XVII. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person, or any one of such persons, to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then

§ 653. A receiver will not be appointed over mortgaged premises in contravention of the spirit and purpose of a legislative enactment which prohibits the sale of a certain

may, in writing, appoint any person he may think fit.

"XVIII. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

"XIX. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

"XX. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided, with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

"XXI. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

"XXII. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not), which is in its nature insurable.

"XXIII. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place, in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and subject, as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

"XXIV. The powers and provisions contained in this part of this act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt."

class of mortgaged property. Thus, where a statute of the state provides that the property of volunteer soldiers, in the military service of the United States, shall be exempt from levy and sale under or by virtue of any deed of trust or mortgage, or by virtue of any execution or order of sale issued on any judgment or decree, plaintiffs in a foreclosure suit, who obtain judgment of foreclosure against the property of such a soldier, are not entitled to a receiver to take charge of the property and receive the rents and profits, since this would be, in effect, an infraction of the spirit and object of the statute.[1]

§ 654. A receiver has been appointed, at the instance of one of several mortgagors, to keep down the interest on the incumbrance, although the mortgagee opposed the application, where he had not taken possession of the premises under the mortgage.[2] But when a mortgagee is in possession of the premises under the mortgage, the courts interfere with such possession with great reluctance, and will not extend their aid by appointing a receiver, unless in cases of fraud or of imminent danger.[3] And when a debtor has mortgaged certain property for the security of his creditors, and the mortgagee is in possession and proceeding properly in the discharge of his trust, selling the property and applying the proceeds in payment of the indebtedness, a receiver will not be be appointed to divest him of the possession, upon a creditor's bill filed against the debtor and mortgagee.[4]

§ 655. While receivers in aid of actions for the foreclosure of mortgages are usually applied for and obtained before final decree of foreclosure, yet in cases of emergency it is competent for the court to entertain an application and appoint a receiver after final decree, when great injury might result from withholding the relief.[5] And while the

[1] Adair *v.* Wright, 16 Iowa, 385.

[2] Newman *v.* Newman, cited in 2 Bro. C. C., 92, note 6.

[3] Furlong *v.* Edwards, 3 Md., 99.

[4] Furlong *v.* Edwards, 3 Md., 99.

[5] Thomas *v.* Davies, 11 Beav., 29; Haas *v.* Chicago Building Society, 89 Ill., 498; Connelly *v.* Dickson,

power to grant the relief, after decree and pending the statutory period of redemption from foreclosure sales, is one which is to be exercised with extreme caution, its existence is well established, and circumstances of fraud and bad faith upon the part of the mortgagor, coupled with his insolvency and the inadequacy of the security, may justify the court in the exercise of the power. Indeed, the necessity for appropriating the rents to the payment of the mortgage debt by the aid of a receiver may frequently not appear until after a decree of sale, since the amount of the mortgage debt is often disputed and can only be determined by final decree, and the amount for which the premises will sell can only be ascertained with certainty by the sale itself.[1] So a receiver of the rents of the mortgaged property has been allowed, after decree of foreclosure, as against a tenant in possession for more than nineteen years, but who was not a party to the suit, the exigency of the case requiring the interposition of the court to prevent the tenant in possession from setting up his adverse possession for twenty years.[2] And pending an appeal from a judgment of foreclosure, a receiver has been appointed when it was shown that the premises were an inadequate security, that the mortgagor had died insolvent, that the rents were being misappropriated, and that the premises had been sold for unpaid taxes.[3] So when an appeal is prosecuted *in forma pauperis* from a decree of foreclosure, a receiver may be allowed, the security being inadequate.[4] And the relief is proper after decree

76 Ind., 440; Brinkman *v.* Ritzinger, 82 Ind., 358; Schreiber *v.* Carey, 48 Wis., 208; Bidwell *v.* Paul, 5 Baxter, 693. And see Smith *v.* Tiffany, 13 Hun, 671.

[1] Haas *v.* Chicago Building Society, 89 Ill., 498. See, also, Schreiber *v.* Carey, 48 Wis., 208.

[2] Thomas *v.* Davies, 11 Beav., 29.

[3] Brinkman *v.* Ritzinger, 82 Ind., 358.

[4] Bidwell *v.* Paul, 5 Baxter, 693. But see Hoge *v.* Hollister, 8 Baxter, 533. And in Indiana, the relief has been granted after a sale under foreclosure, when the premises were in possession of a tenant who had failed to pay rent and the mortgagor was insolvent and unable to redeem from the sale, the rents collected by the receiver to be paid to the mortgagor should he redeem, but otherwise to the mortgagee, the premises having been sold for a

when the mortgagor has paid neither the interest nor any part of the principal, and the property is an inadequate security, the mortgagor being insolvent and having permitted the property to be sold for unpaid taxes.[1] The courts, however, proceed with extreme caution in granting the relief after final judgment of foreclosure, the practice being regarded as an unusual one, and only to be entertained upon a strong showing of probable injury. And when it appears that the property in question is in a good state of preservation, and that it is not being wasted and is in no need of repairs, a receiver will be refused after decree, especially when plaintiffs have other and adequate security for their debt in an approved bond given by defendants on appealing the foreclosure suit.[2] So when the mortgagee neglects for several years after maturity of the indebtedness to institute foreclosure proceedings, and after foreclosure decree he neglects for several months to sell, and afterward applies for a receiver, the emergency must be great and the necessity imperative to warrant the court in interfering. And if, in such case, the evidence as to the inadequacy of the security is conflicting, the court will decline to interfere.[3] And upon a bill by mortgagor against mortgagee for redemption of the mortgaged premises, after a decree directing the redemption, the court will not, on the application of defendant and without notice to plaintiff, direct the appointment of a receiver, such a practice being regarded as without precedent or authority.[4]

§ 656. When a receiver of mortgaged premises is appointed in an action to carry into execution the trusts of the mortgagor's will, a mortgagee, who was not a party to the suit, can not divest the possession of the receiver, by

sum insufficient to satisfy the mortgage indebtedness. Connelly *v.* Dickson, 76 Ind., 440. See, also, Travelers Insurance Co. *v.* Brouse, 83 Ind., 62; Buchanan *v.* Berkshire Life Insurance Co., 96 Ind., 510. But see Sheeks *v.* Klotz, 84 Ind., 471, as to the effect of subsequent legislation in Indiana upon the point under consideration.

[1] Schreiber *v.* Carey, 48 Wis., 208.

[2] Adair *v.* Wright, 16 Iowa, 385.

[3] Cone *v.* Combs, 5 McCrary, 651.

[4] Barlow *v.* Gains, 8 Beav., 329.

mere notice to the tenants of the premises to pay their rents to him, his proper course, in such case, being to apply to the court for the discharge of the receiver. And, on the granting of such discharge, the mortgagor is not entitled to rents which have accrued during the possession of the receiver, and which have been paid into court by him.[1]

§ 657. The right of a mortgagor, over whose property a receiver has been appointed in an action for a foreclosure, to pay the mortgage indebtedness and have the receiver discharged, is regarded as an absolute right, and in no manner dependent upon the discretion of the court. For example, where, upon a bill to foreclose a mortgage given by a railway company to secure its bonds, a receiver has been appointed, and has taken possession of the road, if the owner of the equity of redemption offers to pay the mortgage debt, or as much as is due, upon condition that the property be released and the receiver discharged, the right to the discharge is not a matter resting in the discretion of the court, but is a clear legal right, the denial of which is judicial error.[2]

[1] Thomas *v.* Brigstocke, 4 Russ., 64.

[2] Milwaukee & Minnesota R. Co. *v.* Soutter, 2 Wal., 510. See S. C., Woolworth's C. C., 49. The doctrine is stated by Mr. Justice Miller in the opinion of the court, in 2 Wal., at p. 521, as follows: "The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this court, when the whole case is before it on the record brought here by appeal from a final decree. The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the circuit court, with which this court will not interfere. As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the

§ 658. The jurisdiction of equity to grant receivers over mortgaged premises is not confined to cases where a mortgage has actually been executed between the parties, but extends to cases of equitable mortgages, such as the deposit of title deeds as security for loans or advances. And when two tenants in common of real estate, in equal moieties, deposit their title deeds as security for loans to one of them, with an agreement to execute a legal mortgage when required, upon a bill by the equitable mortgagee for a foreclosure, a receiver of the rents and proceeds may be appointed. And the relief may be properly granted in such a case, although only one of the defendants is before the court, he being in possession and in receipt of the whole of the rents.[1] But where the authorities of a municipal corporation have been authorized by act of parliament to levy rates or assessments and to borrow money on the security thereof, for purposes of public improvement, holders of the bonds and obligations given by the municipal officers for such loans and secured on such rates or assessments are not entitled to a receiver, when there has been no default in the payment either of principal or of interest.[2]

§ 659. When a private corporation is being wound up under the supervision of the court, and a liquidator has been placed in possession of its effects, an equitable mortgagee, on filing his bill for an accounting of what is due him, is entitled to a receiver. And in such case, the official liqui-

litigation was pending. But when those questions had been passed upon by the circuit court, and by this court, also, on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum and have a restoration of his property by discharge of the receiver is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim; and, if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error, judicial error, which this court is bound to correct when the matter, as in this instance, is fairly before it. That the order asked for by appellants should have been granted seems to us very clear."

[1] Holmes *v.* Bell, 2 Beav., 298.

[2] Preston *v.* Corporation of Great Yarmouth, L. R., 7 Ch. Ap., 655.

dator should be appointed, when there is no personal objection to him, and it is manifest that his appointment will be a saving of great expense in closing up the affairs of the corporation.[1]

§ 660. The petition or application for a receiver in aid of an action for a foreclosure should show who is in possession of the premises, since the court is only warranted in appointing a receiver of mortgaged premises when a party to the suit is in possession, either by himself or by his tenants. The court must, therefore, be apprised that the person in possession is a defendant in the action, and that he has had due notice of the application, unless he is in default for not appearing.[2] And an additional reason for requiring the application to show who is in possession of the premises is that if a party to the foreclosure suit is in possession by his tenant, but the tenant is not himself a party to the litigation, his possession will not be disturbed by the appointment, and he will only be directed to attorn to the receiver, and to pay the rent to him instead of his former landlord.[3] And when the plaintiff, in an action for the foreclosure of a mortgage, moves for a receiver upon a decree *pro confesso*, he should show by affidavit the amount due for principal, interest and costs, after all just credits are allowed, and that the defendant is in possession.[4]

§ 661. The jurisdiction of equity by appointing receivers over railways, in actions to foreclose mortgages of the corporate property, is discussed at length in another chapter of this work.[5] It is sufficient here to remark, that while the courts are averse to taking possession of railway corporations by a receiver in behalf of mortgagees, unless a strong case is presented,[6] they proceed, in the exercise of this

[1] Perry *v.* Oriental Hotels Co., L. R., 5 Ch. Ap., 420. But see Boyle *v.* Bettws Llantwit Colliery Co., 2 Ch. D., 726.

[2] Sea Insurance Co. *v.* Stebbins, 8 Paige, 565. See, also, Rogers *v.* Newton, 2 Ir. Eq., 40.

[3] Sea Insurance Co. *v.* Stebbins, 8 Paige, 565.

[4] Rogers *v.* Newton, 2 Ir. Eq., 40.

[5] See chap. XI, *ante*, § 376 *et seq.*

[6] See Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court,

branch of their jurisdiction, upon the usual principles governing them on applications for receivers in the foreclosure of ordinary mortgages, and the inadequacy of the security and insolvency of the mortgagor are regarded as sufficient grounds for the relief.[1]

§ 662. When a judgment creditor of the owner of the equity of redemption in mortgaged premises has obtained a receiver in aid of his judgment at law, the mortgagee may have such receiver extended for his protection under the mortgage, upon showing the insufficiency of the estate for payment of the mortgage indebtedness.[2]

§ 663. In appointing a receiver over mortgaged premises, it is not imperative upon the court to extend the appointment over the entire estate, and the receiver may be limited in the first instance to such portion of the lands as is primarily liable for the payment of the mortgage indebtedness.[3]

§ 664. It has been held, in New York, in the case of a foreclosure of a mortgage containing a stipulation that the mortgagees should be entitled, under certain circumstances, to a receiver, when the defense alleged was usury, but the usury was sworn to only upon information and belief, that the order appointing the receiver should be affirmed on appeal.[4]

§ 665. The aid of a receiver is sometimes granted in an action to foreclose a mortgage of a leasehold interest in realty. And in such a case, the relief may be allowed before answer or process against the defendant mortgagor, upon showing that the landlord is threatening an eviction because of the non-payment of rent.[5]

District of Minnesota, 5 Chicago Legal News, 110.

[1] Ruggles *v.* Southern Minnesota Railroad, *supra;* Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101.

[2] Trye *v.* Earl of Aldborough, 1 Ir. Ch., N. S., 666.

[3] Tressilian *v.* Caniffe, 4 Ir. Ch., N. S., 399.

[4] Knickerbocker Life Insurance Co. *v.* Hill, 5 N. Y. S. C. (Thomp. & Cook), 694.

[5] Barrett *v.* Mitchell, 5 Ir. Eq., 501.

§ 665 *a*. Under a statute authorizing the appointment of a receiver in an action of foreclosure when the mortgaged property is in danger of being lost, removed, or materially injured, or when the property is probably insufficient to discharge the indebtedness, it is proper to grant the relief in a foreclosure suit brought against the administrator of a deceased mortgagor.[1]

[1] Jacobs *v.* Gibson, 9 Neb., 380. As to the right to an appeal and stay of proceedings from an order appointing a receiver over mortgaged premises pending a foreclosure in Wisconsin, see Northwestern Mutual Life Insurance Co. *v.* Park Hotel Co., 37 Wis., 125.

II. Inadequacy of Security and Insolvency of Mortgagor.

§ 666. The principal ground on which courts of equity are called upon to lend their extraordinary aid by the appointment of receivers over mortgaged property, is the inadequacy of the security for the payment of the mortgage indebtedness. This inadequacy, within the meaning of the rules governing this branch of the subject, consists of two elements, viz., the insufficiency of the mortgaged premises *per se* as a fund for the payment of the debt, and the insolvency of the mortgagor or other person primarily liable for the indebtedness, and whose duty it is to make good any deficiency in the security. Stated in general terms, the well-established rule, deducible from the clear weight of authority, is, that in all cases where the rents of the property are not specifically pledged for the security of the debt,

to entitle a mortgagee to a receiver of the mortgaged premises, and of the rents and profits, he must show, first, that the property itself is an inadequate security for the debt with interest and costs of suit; and second, that the mortgagor or other person who is personally liable for the payment is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an execution against him for the deficiency would prove unavailing. And this being shown, the courts will generally interpose and appoint a receiver.[1] And it has been held that the aid of a receiver should be granted or withheld, according as it may or may not be an essential means to pay the indebtedness secured by the mortgage, and there can be no necessity for the relief, if the mortgagor is solvent and able to pay any deficiency.[2]

§ 667. It is to be observed that, in the application of the rule as above stated, the courts require satisfactory proof, both as to the inadequacy of the security and insolvency of the mortgagor or other person liable for the debt. And unless both these conditions are shown to exist, no sufficient

[1] Quincy *v.* Cheeseman, 4 Sandf. Ch., 405; Brown *v.* Chase, Walk. (Mich.), 43; Hyman *v.* Kelly, 1 Nev., 179; Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110; Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101; Hill *v.* Robertson, 24 Miss., 368; Sea Insurance Co. *v.* Stebbins, 8 Paige, 565; Schreiber *v.* Carey, 48 Wis., 208; Commercial & Savings Bank *v.* Corbett, 5 Sawyer, 172; Buchanan *v.* Berkshire Life Insurance Co., 96 Ind., 510; Kerchner *v.* Fairley, 80 N. C., 24; Oldham *v.* Bank, 84 N. C., 304. And the jurisdiction to appoint receivers, in this class of cases, upon the grounds stated in the text, is not impaired by the code of procedure in New York. Hollenbeck *v.* Donnell, 94 N. Y., 342, affirming S. C., 29 Hun, 94. And see Herbert *v.* Greene, 3 Ir. Ch., N. S., 274; Warner *v.* Gouverneur's Ex'rs, 1 Barb., 36; Astor *v.* Turner, 2 Barb., 444. But see, *contra*, Cortleyeu *v.* Hathaway, 3 Stockt., 39; Frisbie *v.* Bateman, 9 C. E. Green, 28, approving and following Best *v.* Schermier, 2 Halst. Ch., 154.

[2] Myers *v.* Estell, 48 Miss., 403. And see this case for an application of the principles governing relief by receivers in cases of mortgages, to cases of deeds of trust.

cause is presented to warrant the interference of equity.[1] When, therefore, it does not sufficiently appear that the mortgaged premises are an inadequate security for the payment of the indebtedness, the relief will be refused, even though it is shown to the satisfaction of the court that the mortgagor is insolvent.[2] And by inadequacy of security, within the meaning of the rule, is to be understood inadequacy as to the particular mortgage which is being foreclosed, and not as to other and subsequent mortgages. If, therefore, the premises are shown to be a sufficient security for the mortgage which is in process of foreclosure, although an inadequate security for other and later mortgages and liens, no sufficient ground for a receiver is presented, even though the mortgagor is plainly insolvent and unable to respond for a deficiency.[3] And the burden of proof rests

[1] Sea Insurance Co. *v.* Stebbins, 8 Paige, 565; Morris *v.* Branchaud, 52 Wis., 187.

[2] Brown *v.* Chase, Walk. (Mich.), 43. The doctrine is very clearly stated in the opinion of the court in this case as follows: "A receiver of the rents and profits of mortgaged premises is sometimes appointed on the petition of the mortgagee, after he has filed his bill to foreclose the mortgage. The court must be satisfied, before making the appointment, that the mortgaged premises are insufficient to pay the mortgage debt, and that the mortgagor or other party to the suit who is personally liable for its payment, is insolvent, or out of the jurisdiction of the court, so that an execution against him for the balance that should remain due after the sale of the mortgaged premises would be unavailing. Chase, the mortgagor, who is personally liable for the payment of the debt, has been decreed a bankrupt on his own petition. So far, the complainants have made out their case; but they have failed to satisfy the court that the mortgaged premises are insufficient to pay the mortgage debt. The security was one of their own taking, and the presumption is that it is sufficient, until the contrary appears."

[3] Warner *v.* Gouverneur's Executors, 1 Barb., 36. "The rule in these cases," says Edmonds, J., p. 38, "where the mortgagee has not taken care to keep down the accruing interest, by securing a lien on the rents and profits, is to interfere with the mortgagor's possession prior to a decree of foreclosure, and appoint a receiver of the rents and profits, when the premises are an inadequate security for the debt secured by the mortgage, and the mortgagor, or other person in possession, who is personally liable for the debt, is not of sufficient ability to answer for the deficiency. In this case, there seems to be no doubt

upon plaintiff to establish the inadequacy of the security, and if he fails in this the relief will be denied.[1] But when the income, rents and profits of the premises are pledged by the mortgage, less stringency of proof is required to warrant the court in granting a receiver.[2] And when the court has appointed a receiver in a foreclosure suit because of the inadequacy of the security, an appellate court will be reluctant to disturb the finding of the court below as to the fact of such inadequacy.[3] If, however, only a part of the mortgage indebtedness is due and the premises are divisible into two nearly equal parts, which may be sold separately without injury, so that the mortgagee is only entitled to foreclose as to one of such parcels, he will not be allowed a receiver as to that part of the debt not yet due, or as to that portion of the premises as to which his right to foreclose has not yet accrued.[4]

§ 668. Under the practice of the Irish Court of Chancery, in actions for the foreclosure of mortgages, or to raise a charge affecting lands by sale thereof, a receiver will be appointed only under the following circumstances: first, when interest is due on the security, the court usually requiring an affidavit that one year's interest at least is due. Secondly, when the property itself is in danger, as if the lands are held under a lease, and the rental due thereon has been permitted to remain in arrears. Thirdly, when there is reason to apprehend that the sum which may be realized

of the mortgagor's insolvency, but there does seem to be a good deal of doubt as to the inadequacy of the security of the mortgaged premises. The allegation is, that they are not an adequate security for 'all just incumbrances' on them. All of the just incumbrances, it would seem, amount to near $70,000, while the claim of the defendants is not more than half that sum. And while the defendants do not say whether the premises are or are not adequate security for the amount due to them, the mortgagor, on the other hand, avers that they are sufficient for that amount. There is, therefore, no ground for the appointment of a receiver."

[1] Burlingame v. Parce, 12 Hun, 144.

[2] Des Moines Gas Co. v. West, 44 Iowa, 23.

[3] Pouder v. Tate, 96 Ind., 330.

[4] Hollenbeck v. Donnell, 94 N. Y., 342.

upon a sale of the lands will be insufficient to satisfy the incumbrances or charges thereon.[1]

§ 669. Notwithstanding the clear weight of authority in support of the rule as stated, allowing receivers of mortgaged premises in aid of a foreclosure when the security is inadequate and the mortgagor insolvent, the courts of New Jersey were formerly averse to the interference upon this ground, and it was held that the conditions mentioned were not sufficient cause for relief in equity by a receiver.[2] The grounds upon which the courts of that state based their refusal to follow the general rule were, that when one takes a mortgage security and permits the mortgagor to remain in possession, if there is a default in payment the mortgagee must appropriate the property in the usual way to the payment of his debt. If he has a first mortgage and wishes possession, he must take his legal remedy by ejectment. If he is a second incumbrancer, he takes his security with that disadvantage.[3]

§ 670. The courts of New Jersey have, however, recognized other circumstances, when coupled with inadequacy of the security and insolvency of the mortgagor, as sufficient foundation for relief in equity. And it is laid down as a general doctrine, that a receiver may be allowed when, in addition to the insolvency of the mortgagor and inadequacy of the security, any act has been done by the mortgagor, or tenant in possession, which shows fraud or bad faith in appropriating the rents and profits for other purposes than keeping down the interest on the incumbrances.[4] So it is said that a receiver may be allowed if the circumstances have materially changed after the giving of the security, as if the buildings have burned down or been per-

[1] Master of the Rolls in Herbert *v.* Greene, 3 Ir. Ch., N. S., 274.

[2] Cortleyeu *v.* Hathaway, 3 Stockt., 39; Frisbie *v.* Bateman, 9 C. E. Green, 28, approving and following Best *v.* Schermier, 2 Halst. Ch., 154.

[3] Cortleyeu *v.* Hathaway, 3 Stockt., 39.

[4] Cortleyeu *v.* Hathaway, 3 Stockt., 39.

mitted to decay, or if waste has been committed, or if the property has depreciated in value through the fault or negligence of the mortgagor, or tenant in possession. And when, in addition to the inadequacy of the security and the mortgagor's insolvency, he had transferred the property to a third person, also insolvent, and who paid no portion of the purchase money and failed to carry out his agreement to pay a portion of plaintiff's mortgage, by reason of which agreement the mortgagee had delayed the enforcement of his demand, the circumstances were deemed sufficient to warrant a receiver of the crops growing upon the premises, unless the defendant would give adequate security for any deficiency which might result.[1] And when the mortgagee files a bill to foreclose, showing that he has no personal security for his debt, that the premises are an inadequate security, that the mortgagor who is in possession and in receipt of the rents has not kept down the interest and taxes, thereby permitting a lien for taxes to be created paramount to that of the mortgage, he is entitled to a receiver.[2] So when an action of ejectment is brought by the mortgagee to recover possession, and upon a bill to foreclose he applies for a receiver in aid of the action at law, he is entitled to the relief when the mortgagor is insolvent and the security inadequate, the mortgagor having removed from the premises and delivered possession to one who is permitted to retain possession without payment of rent, the mortgagor having also committed waste and threatening future waste.[3] But the fact that the mortgagor in possession had made an assignment, according to law, of all his interest in the premises for the benefit of his creditors, under which assignment the assignees had sold the mortgagor's interest, and the purchaser had voluntarily transferred his purchase to the wife of the mortgagor, was held not to constitute any strong

[1] Cortleyeu *v.* Hathaway, 3 Stockt., 39.

[2] Mahon *v.* Crothers, 28 N. J. Eq., 567; Chetwood *v.* Coffin, 30 N. J. Eq., 450.

[3] Brasted *v.* Sutton, 30 N. J. Eq., 462.

ground for the appointment of a receiver of the profits of the growing crops, in behalf of a first mortgagor, the case being regarded as standing upon the same ground as if there had been no assignment, and the application were made against the mortgagor in possession.[1]

§ 671. In Mississippi, while the mortgagor's insolvency and the inadequacy of the security are recognized as sufficient grounds for a receivership, the relief is also based upon another ground. And it is held, in that state, that upon maturity of the debt and a failure to pay, the legal title becomes absolute in the mortgagee, which draws with it the right of possession, and that in appointing a receiver, in such case, the court merely confers upon him such rights and powers as a court of law would have conferred upon the mortgagee, where his title was sufficient to give him the possession and consequent use of the property.[2] But, unless the mortgagee has contracted to have the rents and income after default made, he is not entitled to them, nor to the aid of a receiver to get them in, unless the mortgaged property is insufficient to satisfy the debt.[3]

§ 672. In addition to the two principal elements already mentioned as the usual ground upon which receivers are allowed in this class of cases, the fact that the taxes upon the mortgaged property have been suffered to remain unpaid, that a sale for unpaid taxes has been had, and that the insurance upon the buildings covered by the mortgage has been neglected, presents strong grounds for the interference of equity by a receiver.[4] And when the mortgagor has failed to comply with his covenant to keep the premises insured and to pay the taxes, the mortgagee having been compelled to pay insurance and taxes, and it is shown that the premises are greatly in need of repairs, the court will

[1] Frisbie *v.* Bateman, 9 C. E. Green, 28.

[2] Hill *v.* Robertson, 24 Miss., 368.

[3] Whitehead *v.* Wooten, 43 Miss., 523.

[4] Wall Street Fire Insurance Co. *v.* Loud, 20 How. Pr., 95; Finch *v.* Houghton, 19 Wis., 149; Schreiber *v.* Carey, 48 Wis., 208; Eslava *v.* Crampton, 61 Ala., 507.

not closely scrutinize the proof as to the insufficiency of the security before granting the relief.[1] So, too, the existence of a contest as to whether a large portion of the property, constituting the chief value of the security, is covered by the mortgage, is an additional ground for the relief in such case.[2]

§ 673. In Nevada, under the statutes and code of procedure of that state, a mortgagee has but one remedy against the mortgagor in case of default, viz., the ordinary equitable remedy by foreclosure and sale, and is not entitled to bring ejectment at law, nor to a strict foreclosure and sale. For this reason, inadequacy of the security and the mortgagor's insolvency are held to be sufficient to warrant the appointment of a receiver in aid of foreclosure proceedings; especially when the mortgagor has pledged the rents and profits arising from the mortgaged premises to keep down the interest on the mortgage, and when he afterward diverts the rents from this purpose. And when, in such case, the mortgagees themselves become the purchasers at the foreclosure sale, and under the statute a period of six months must intervene between the sale and the time when the purchasers are entitled to a deed and the possession of the premises, the court will extend the protection of a receiver to the purchasers.[3]

§ 674. In California, however, under a similar statute to that of Nevada, limiting the mortgagee's remedy to the ordinary foreclosure, a contrary doctrine prevails, and it is held that the same reasons for the interference of equity do not exist as under the English practice, in the appointment of receivers to collect the rents of the mortgaged premises *pendente lite*. The mortgage being considered only as a security for the debt, the estate remains that of the mortgagor as owner, and must continue so to remain until, by foreclosure and sale, a new owner is substituted. Hence

[1] Eslava *v.* Crampton, 61 Ala., 507.

[2] Wall Street Fire Insurance Co. *v.* Loud, 20 How. Pr., 95.

[3] Hyman *v.* Kelly, 1 Nev., 179.

the mortgagee is not entitled to the aid of a receiver, even though the bill alleges the insolvency of the mortgagor and inadequacy of the security.[1] And in Iowa, the mortgagor being entitled to possession until the expiration of a year from the foreclosure sale, and entitled to the crops during such period, the mortgagee will not be allowed a receiver because of inadequacy of the security and insolvency of the mortgagor, although it is averred that the mortgagor has fraudulently disposed of other property upon which the mortgagee has no lien.[2]

§ 675. While, as a general rule, the courts will not interfere by appointing receivers in aid of mortgagees when the indebtedness is not yet due,[3] yet there may be circumstances sufficient to justify a partial departure from the rule. And when, from the nature of the mortgaged premises, it is apparent that they are so indivisible as to render it necessary to sell them as an entirety upon a decree in foreclosure, a receiver will be allowed, although only a portion of the mortgage indebtedness is due, if it is satisfactorily shown to the court that the premises are an inadequate security for the debt, and that the mortgagor is personally irresponsible for the deficiency in the security.[4] If, however, there is doubt as to the amount actually due, and the plaintiff's allegations as to the inadequacy of the security are denied by the answer, the court will not interfere with the possession by appointing a receiver.[5]

§ 676. The interference of courts of equity by appointing receivers over the mortgaged estate upon the principal grounds already discussed, is not confined to mortgages of the fee, but may also be allowed in case of a mortgage of a leasehold interest in the premises. And upon a bill to foreclose a mortgage of a leasehold, when the mortgagor is in

[1] Guy *v.* Ide, 6 Cal., 99.

[2] White *v.* Griggs, 54 Iowa, 650.

[3] Bank of Ogdensburgh *v.* Arnold, 5 Paige, 38.

[4] Quincy *v.* Cheeseman, 4 Sandf. Ch., 405. See, also, Buchanan *v.* Berkshire Life Insurance Co., 96 Ind., 510.

[5] Callanan *v.* Shaw, 19 Iowa, 183.

insolvent circumstances and has transferred his equity of redemption in the premises, a receiver may be appointed, and the assignee of the mortgagor in possession will be directed to attorn to the receiver. The relief is regarded as peculiarly appropriate in such case, since without it the owner of the equity of redemption might, by protracting the litigation until the expiration of the lease, render the security utterly valueless.[1]

§ 677. In an action for the foreclosure of a mortgage, when a receiver is sought by the mortgagee upon the ground of inadequate security and the mortgagor's insolvency, it is no sufficient objection to the interference of the court, that the premises are in possession of a tenant of the mortgagor, when the tenant is before the court as a party to the suit; since, if such possession by the tenant were to be recognized as a bar to relief in equity by a receiver, it would be in the power of a mortgagor to greatly jeopardize the security and rights of the mortgagee, simply by placing the property in the possession of a tenant.[2] So persons who have taken possession of the mortgaged premises under contract with the mortgagor, after default in

[1] Astor *v.* Turner, 2 Barb., 444.

[2] Keep *v.* Michigan Lake Shore R. Co., U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101. This was an application for a receiver, upon a bill for foreclosure filed by trustees in a mortgage given by a railway company to secure its bonds, the mortgagor having delivered possession of the property to a tenant. The court, Withey, J., say, p. 102: "The objection is made to appointing a receiver because the Continental Improvement Co. is in possession as tenant of the mortgagors, and it is claimed the extent a court will go, in such case, is to order the tenant to attorn to the mortgagee. If the tenant was not a party before the court, that would be no objection to the appointment of a receiver, to whom the tenant could be required to attorn and pay over the rents, instead of paying them to the mortgagor, but without power in such receiver to molest the possession of the tenant. When, however, the tenant is a party before the court, a receiver of the mortgaged premises may be appointed. Any other view would place it in the power of a mortgagor, by leaving the mortgaged property, to greatly jeopardize the security and interests of a mortgagee."

payment of the mortgage indebtedness and with knowledge of the mortgagor's insolvency and of the condition of the property, may be required to surrender possession to the receiver, or to pay a reasonable rental for the premises.[1]

§ 678. Where a corporation of a *quasi* public nature, as a canal company, issues bonds for the completion of its undertaking, pledging all its property, real and personal, for the payment of the bonds and interest, and making them a first lien upon the assets of the company, the bonds will be regarded as in the nature of a mortgage, to the extent of authorizing a receiver in behalf of the bondholders, to take charge of the affairs of the company upon a bill alleging non-payment, and that the corporation is insolvent and its property going to ruin.[2]

§ 678 *a*. The right to the aid of a receiver in a foreclosure suit is not limited to the mortgagee or his assigns, and the relief may be granted in behalf of other parties to the action when necessary for the protection of their interests in the subject-matter of the litigation. Thus, when a wife has joined in the execution of a mortgage upon lands of the husband to secure his indebtedness, and her inchoate interest is afterward set off and allotted to her in a portion of the lands absolutely, under a statute of the state, if the remainder of the premises is insufficient to pay the debt and the husband is insolvent, a receiver may be appointed over such remainder upon the application of the wife upon a cross-bill by her seeking to have the remainder first sold and applied in satisfaction of the mortgage debt.[3]

§ 678 *b*. When a mortgagee seeks the aid of a receiver to collect the rents and apply them in payment of the mortgage indebtedness, upon the ground of inadequate security and insolvency of the mortgagor, the proper time for the mortgagor to assert his right to the rents as being exempt under the exemption laws of the state is upon the hearing

[1] Mutual Life Insurance Co. *v.* Spicer, 12 Hun, 117.

[2] White Water Valley Canal Co. *v.* Vallette, 21 How., 414.

[3] Main *v.* Giuthert, 92 Ind., 180.

of the application for the receiver. And when the receiver has been appointed and directed to apply the rents in payment of the debt, the mortgagor can not, by a subsequent action, recover such rents from the receiver upon the ground that they are exempted from seizure, the order appointing the receiver, in such case, being regarded as *res judicata* upon the question of the right to the rents.[1]

[1] Storm *v.* Ermantrout, 89 Ind., 214.

III. Receivers as Between Different Mortgagees.

§ 679. Under the English practice, when there are several mortgages of different priority upon the same premises, the first mortgagee, being vested with the legal title and the right to immediate possession, is called the legal mortgagee, and all others are equitable mortgagees or incumbrancers. And the doctrine of the English Court of Chancery, announced in strong terms by Lord Eldon, and which has also been recognized and enforced in this country, was, that as against a prior mortgagee in possession of the property under his mortgage, a receiver would never be granted in behalf of subsequent mortgagees, while anything remained due to the prior mortgagee under his incumbrance. In such cases, the only remedy open to the second or equitable mortgagee is to pay off the prior incumbrancer and redeem from the lien of his mortgage. The rule is based upon the

unwillingness of courts of equity to interfere with the legal title or with possession under it, and their disinclination to substitute another security for that which the parties contracted for. The courts refuse, therefore, to grant a receiver in this class of cases, or to interfere with the receipt of the rents and profits by the prior mortgagee in possession, since such interference would virtually have the effect of dispossessing him.[1] And upon motion for a receiver against a mortgagee in possession, who insists by his answer that he has not been fully paid, the court will not, by affidavits upon the hearing of the motion, try the question as

[1] Berney *v.* Sewell, 1 Jac. & W., 647; Rowe *v.* Wood, 2 Jac. & W., 553; Hiles *v.* Moore, 15 Beav., 175; Trenton Banking Co. *v.* Woodruff, 2 Green Ch., 210. See, also, Codrington *v.* Parker, 16 Ves., 469; Faulkener *v.* Daniel, 10 L. J., N. S. Ch., 33; Quinn *v.* Brittain, 3 Edw. Ch., 314. In Berney *v.* Sewell, 1 Jac. & W., 647, the rule was stated by Lord Eldon as follows: "If a man has a legal mortgage, he can not have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but, if he is in possession, you can not come here for a receiver; you must redeem him, and then, in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance. If you recollect, in Mr. Beckford's case, I went to the very utmost; I said then that if Mr. Beckford would swear that there was sixpence due to him, I would not take away the possession from him. If there is anything due, I can not substitute another security for that which the mortgagee has contracted for. I know no case where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him off according to his demand as he states it himself. I can not appoint the receiver against these defendants, unless you can bring me their confession that they are paid off, or their refusal to accept what is due to them. The rule about receivers is very clear; a mortgagee who has the legal estate can not have a receiver; an equitable mortgagee may, but he can not if the first is in possession. I remember a case where it was much discussed whether the court would appoint a receiver when it appeared by the bill that there was a prior mortgagee who was not in possession. I have a note of that case. There Lord Thurlow made the appointment without prejudice to the first mortgagee's taking possession, and that was afterward followed by Lord Kenyon." See Rowe *v.* Wood, 2 Jac. & W., 553.

to whether any balance is still due to the mortgagee.[1] Nor will the court interpose, even though the priority of the first mortgagee in possession is contested by the other mortgagee, when he does not show that the mortgagee in possession is insolvent and unable to respond in case it should be determined that he has not a priority of lien.[2]

§ 680. The rule as laid down in the preceding section is not confined to cases where the subsequent claimant is strictly a mortgagee, but is sometimes extended to cases where the claim or right asserted as against the estate is of another nature. Thus, it is held that, as against a mortgagee in possession, holding the premises as security for his debt, a court of equity will not appoint a receiver of the rents and profits on a creditor's bill filed by a judgment creditor of the mortgagor, when the mortgagee has not been paid the amount due him and is fully able to respond for what he may receive.[3] So, too, as against mortgagees in possession, whose mortgage and other charges upon the estate have not been fully satisfied, the heirs-at-law of the testator, upon a bill against the mortgagees for an account, are not entitled to a receiver of the mortgaged premises. And in such case, it is a sufficient answer to the application for a receiver that the mortgage and other charges upon the estate prior to the claim of the heirs have not been discharged.[4]

§ 681. In the application of the rule under discussion, denying a receiver as against a first mortgagee in possession, it must clearly appear that something remains actually due to such mortgagee.[5] And where the mortgagee in possession had been so negligent in keeping his accounts, that it could not be determined what was due under his mortgage,

[1] Rowe *v.* Wood, 2 Jac. & W., 553.

[2] Trenton Banking Co. *v.* Woodruff, 2 Green Ch., 210.

[3] Quinn *v.* Brittain, 3 Edw. Ch., 314.

[4] Faulkener *v.* Daniel, 10 L. J., N. S. Ch., 33.

[5] See Codrington *v.* Parker, 16 Ves., 469; Hiles *v.* Moore, 15 Beav., 175.

the court allowed the motion for a receiver to stand over in order that defendant might show by affidavit how much was due him, and directed that, if he failed to give such information, a receiver should be allowed.[1] So when a third mortgagee took possession of the premises, and afterward bought up a first mortgage with a view to tacking the securities, and remained in possession several years, receiving considerable sums of money from the premises, a receiver was allowed as against him upon the application of the second mortgagee, when it did not satisfactorily appear that anything was due under the first mortgage. The interference of the court, under such circumstances, rests upon the necessity of protecting the rents and profits of the estate for the benefit of those who shall ultimately be found entitled to them.[2]

§ 682. It has been shown in the preceding sections, that the doctrine of non-interference as against prior mortgagees is strictly limited to cases where the mortgagee has actually taken possession of the premises under his mortgage, and has no application to cases where the prior mortgagee is out of possession. And the rule is well settled, that when the first mortgagee has not taken possession of the property, equity may properly interfere in behalf of subsequent mortgagees or equitable incumbrancers and creditors, and may appoint a receiver for their protection, but without prejudice to the rights of the first mortgagee.[3] The only doubt which seems to have existed as to the propriety of the doctrine has been upon the question of the necessity of first obtaining consent of the prior mortgagee before interfering by a receiver. And in a case decided by Lord Thurlow in 1783, the rule was stated to be, that a second mortgagee could not have a

[1] Codrington *v.* Parker, 16 Ves., 469.

[2] Hiles *v.* Moore, 15 Beav., 175. And see this case as to the practice in determining the rights of conflicting mortgagees, where a receiver is sought of the rents and profits.

[3] Bryan *v.* Cormick, 1 Cox, 422; Dalmer *v.* Dashwood, 2 Cox, 378; Tanfield *v.* Irvine, 2 Russ., 149.

receiver without the consent of the first, since the court could not prevent the first mortgagee from bringing an action of ejectment against the receiver immediately upon his appointment.[1] Subsequently, however, the same learned chancellor seems to have become convinced that the consent of the prior mortgagee was not necessary to confer jurisdiction, and in a case decided by him in 1788, a receiver was allowed of the mortgaged premises in behalf of subsequent equitable creditors, although it was objected on the part of mortgagees that the court never appointed a receiver of a mortgaged estate without the consent of the mortgagee.[2] And the court will not permit the prior incumbrancer to prevent the appointment of a receiver by anything short of a personal assertion of his legal right, and the taking possession himself.[3]

§ 683. As illustrative of the rule allowing receivers, in behalf of subsequent equitable mortgagees or incumbrancers, upon the grounds already stated, it is held that annuitants whose annuities are chargeable upon real estate which

[1] Phipps *v.* Bishop of Bath, Dick., 608. This was an application on behalf of a second mortgagee for a receiver, and that he might apply the rents in keeping down the interest of a mortgage, and of another charge upon the estate, and pay the surplus rents into bank. The first mortgagee had declined any steps to get possession. Lord Thurlow held as follows: "A second mortgagee, the mortgagor living, can not have a receiver without the consent of the first mortgagee, because the court can not prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is appointed."

[2] Bryan *v.* Cormick, 1 Cox, 422. Lord Thurlow asked if the mortgagees were in possession, "and it appearing they were not, his lordship said he could see no reason, if a mortgagee had not thought proper to take possession, why the court should not put a receiver on the estate, so as that it should be without prejudice to the mortgagee's right to obtain the possession. Where a receiver has been appointed of a mortgaged estate, the mortgagee not being brought before the court, the mortgagee must apply to the court for liberty to bring an ejectment, which is of course. So here, if the receiver is appointed without prejudice to the mortgagee's right, there could be no objection to it. And his lordship ordered that the receiver should be appointed without prejudice," etc.

[3] Silver *v.* Bishop of Norwich, 3 Swans., 112, note.

has been previously mortgaged to different mortgagees, are entitled to the aid of equity by a receiver of the rents of the mortgaged premises, when the prior mortgagees have not yet taken possession. And in such a case, it is not necessary that the prior incumbrancers should be made parties to the action, but the order for the receiver will be made without prejudice to their rights.[1]

§ 684. There is some conflict in the English decisions upon this class of cases, as to whether the subsequent incumbrancer or mortgagee is entitled to a receiver of the rents and profits, in a case otherwise sufficient for the relief, when the mortgagor is beyond the jurisdiction of the court, and has not been served with process. The better-considered doctrine appears to be, that the court may properly interfere in such a case, and that it ought not to permit the rights of a subsequent incumbrancer to be lost, by the circumstance that the mortgagor has not entered an appearance, and can not be compelled to appear because beyond the jurisdiction of the court.[2] But a contrary doctrine was held in another case, and a receiver was refused in behalf of an equitable mortgagee, upon a bill against the mortgagor and a subsequent equitable incumbrancer, where the mortgagor resided beyond the jurisdiction of the court and had not appeared to the suit. And the refusal to interfere was based upon the ground that the court had no jurisdiction, for the purposes of an application for a receiver, against the possession of a party who was not before the court to defend himself.[3]

[1] Dalmer *v.* Dashwood, 2 Cox, 378.

[2] Tanfield *v.* Irvine, 2 Russ., 149.

[3] ——— *v.* Chadwick, 4 L. J., Ch., 67. In this case, a bailiff of the mortgagor received the rents of the estate, and remitted them to the mortgagor residing in a foreign country. The decision, however, being in the Vice-Chancellor's court, can hardly be regarded as of equal authority with Tanfield *v.* Irvine, 2 Russ., 149, which was before the High Court of Chancery. And additional doubt is thrown upon its weight as authority by a note of the reporter, who adds: "It is supposed by some of the most experienced king's counsel, that the Lord Chancellor has appointed receivers in similar cases."

§ 685. While, as has thus been shown, courts of equity may, in proper cases, interfere by appointing receivers in aid of subsequent equitable incumbrancers or creditors, they yet proceed in the exercise of this branch of their jurisdiction with much caution. And the established rule is, that the court will only grant a receiver in behalf of an equitable creditor or incumbrancer, by making the order without prejudice to persons having prior interests or estates in the property. If their prior estates are legal estates or interests, the court by its appointment does not prevent them from proceeding to obtain possession under their legal title, if they think proper. If they are equitable estates, the court takes care, in the appointment of its receiver, not to disturb any prior equities, and for this purpose directs inquiries to determine priorities among the different equitable incumbrancers.[1] And the appointment of a receiver, in cases where there are incumbrancers or mortgagees interested adversely to the plaintiff obtaining the receiver, is for the benefit of such incumbrancers only so far as expressed to be for their benefit, or so far as they choose to avail themselves of it, since a court of equity will not interfere to deprive them of the advantage of their legal rights.[2]

§ 686. When it is satisfactorily made to appear to the court, that a receiver in behalf of a mortgagee of the property of a corporation is necessary to protect the mortgagee's interests, it is no sufficient objection to granting the relief that a large number of other mortgagees of the same property are satisfied with the management of the corporation, which is in the hands of a manager or trustee for the benefit of the mortgagees. And the court will grant a receiver, in such case, although the mortgagee seeking the relief represents only one-ninth of the mortgage indebtedness.[3]

[1] Davis *v.* Duke of Marlborough, 2 Swans., 137, 138, 165.

[2] Gresley *v.* Adderley, 1 Swans., 573.

[3] Fripp *v.* The Bridgewater Co., 11 Hare, 239; S. C., 17 Jur., 887; 22 L. J., 1084.

§ 687. Under the practice of the Irish Court of Chancery, a receiver can not be appointed on the application of a judgment creditor, after his debtor is adjudicated a bankrupt, as against a *puisne* mortgagee in possession.[1]

§ 688. The question of the right to rents and profits of the mortgaged estate, upon the appointment of receivers where there are different mortgagees, is one of considerable importance and deserving of special notice. The general rule is that a junior mortgagee, who obtains a receiver of the rents and profits, in aid of a bill to foreclose his mortgage, is entitled to the rents and profits at the hands of such receiver, up to the time of appointing a receiver upon a bill by a prior mortgagee, not a party to the original suit. And the prior mortgagee is only entitled to have of the receiver such rents and profits as accrue after the appointment in aid of such prior mortgagee, although one and the same person is appointed in both cases. The rule is based upon the consideration that, until the elder mortgagee sees fit to assert his right to the rents and income, a junior incumbrancer has a right so to do, and the first mortgagee not being a party to the former suit, and having no lien on the rents and profits, and no right to recover the back rents, he can only assert his right thereto, as against the receiver, from the date of appointment in his own suit.[2] The proper course, therefore, for an incumbrancer to take who is desirous of having the benefit of a receiver already appointed, is to file a bill for that purpose and obtain an order extending the receiver to his incumbrance.[3] In such case, the extension of the receiver is regarded as a new appointment, and the rents theretofore received by him are treated as

[1] Ryan *v.* Lefroy, 3 Ir. Ch., N. S., 351.

[2] Howell *v.* Ripley, 10 Paige, 43; Ranney *v.* Peyser, 83 N. Y., 1; Washington Life Insurance Co. *v.* Fleischauer, 10 Hun, 117. And see Post *v.* Dorr, 4 Edw. Ch., 412; Sanders *v.* Lord Lisle, Ir. Rep., 4 Eq., 43; Agra & Masterman's Bank *v.* Barry, Ir. Rep., 3 Eq., 443; Lanauze *v.* Belfast, Holywood & Bangor R. Co., id., 454; Miltenberger *v.* Logansport Railway Co., 106 U. S., 286.

[3] Sanders *v.* Lord Lisle, Ir. Rep., 4 Eq., 43.

by-gone rents which the mortgagee last asserting his right has suffered other claimants to realize, and the order extending the receiver for the benefit of the prior mortgagee will attach only to the rents thereafter received.[1] And until this course is pursued, the incumbrancer upon whose application the receiver was originally appointed is entitled to have the rents received applied in satisfaction of his demand, irrespective of any question of priority, since such rents are realized by his superior diligence. Hence the court will refuse to direct the receiver already appointed to pay out of the rents and profits the arrears due to the mortgagee or incumbrancer who has not yet filed his bill or obtained an order extending the receiver for his protection, since such order would deprive the mortgagee first obtaining a receiver of all benefit or advantage gained by his diligence.[2] But when the receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the foreclosure sale, leaving a surplus which is applied to the payment of the second mortgage, if such surplus is insufficient to pay the second mortgage in full, resort may be had for the deficiency to the rents collected by the receiver. In such case, the first mortgagee having procured the receiver and having the right to satisfy his debt, either out of the proceeds of sale or out of the rents collected by the receiver, if he elects to take the proceeds of sale, the second mortgagee is entitled to be subrogated to the rents.[3] But if the appointment is made upon the application of a junior mortgagee in an action to which all the prior mortgagees are made defendants, and the appointment is not limited to or made in behalf of the junior mortgagee, but is general in its nature, the fund collected by the receiver is

[1] Agra & Masterman's Bank *v.* Barry, Ir. Rep., 3 Eq., 443; Lanauze *v.* Belfast, Holywood & Bangor R. Co., id., 454. But see Beverley *v.* Brooke, 4 Grat., 187.

[2] Sanders *v.* Lord Lisle, Ir. Rep., 4 Eq., 43; Ranney *v.* Peyser, 83 N. Y., 1.

[3] Keogh *v.* McManus, 34 Hun, 521.

applicable to the payment of the different mortgages in the order of their priority.[1]

§ 689. Notwithstanding the rule as stated in the preceding section, as to the right to rents in the hands of a receiver, where there are different mortgagees, is supported by the clear weight of authority, a somewhat different doctrine has been established in Virginia. And it is there held, as between different incumbrancers of the same property, whose rights are conflicting and who are seeking to gain priority by different suits in the same court, that the appointment of a receiver in behalf of the plaintiff in one of the suits is for the benefit of all parties in interest; and that when the plaintiff in another suit succeeds in maintaining his priority of right, he is entitled to a decree for an account of the rents and proceeds in the hands of the receiver appointed in the other action, and an appropriation of so much thereof as may be necessary for the satisfaction of his debt. The appointment of a receiver, as against the mortgagor and a prior mortgagee, is also held to be in the nature of an injunction defeating the mortgagee's right of election to take possession of the property, so that he can not afterward take possession if he would, the court having taken possession for him, and maintaining it until his right is determined. And this is held to be equally true, whether his right be impeached in an adverse suit brought against him, or if, not being a party to the litigation, he obtains leave to be examined therein *pro interesse suo*. But the two cases are regarded as distinguishable in this, that in the former he has only to await the decision of the controversy, and receive the proceeds from the hands of the court; while in the latter it is his duty to come forward within a reasonable time, since if he suffers the fund to be paid over to the mortgagor or to subsequent incumbrancers, he will be too late.[2] The Virginia doctrine, however, while ingenious in theory, lacks the support of authority, and is clearly opposed to the Eng-

[1] Williamson *v.* Gerlach, 41 Ohio St., 682.

[2] Beverley *v.* Brooke, 4 Grat., 187.

lish rule, that the appointment of a receiver in behalf of a junior incumbrancer is always without prejudice to the rights of an elder mortgagee.[1]

§ 690. It has already been shown, that the courts of New Jersey have always been averse to extending the aid of receivers to mortgagees, when the mortgagor is in possession of the premises, and the usual grounds of insolvency of the mortgagor and inadequacy of the security, upon which the relief is generally based, are not recognized in that state as sufficient cause for a receiver.[2] It is also held, in that state, that as between prior and subsequent mortgagees of the same premises, upon a bill by the prior mortgagee for a foreclosure, the court will not grant a receiver of the rents and profits of the premises, when they have been assigned by the mortgagor to the junior mortgagee as additional security for his indebtedness.[3]

§ 691. Upon a bill by a junior mortgagee against the mortgagor and an elder mortgagee for a foreclosure, and also seeking to compel the prior mortgagee to first exhaust another mortgage held by him upon other property for the same indebtedness, it is proper that a receiver should be had to collect the rents, upon satisfying the court of the insufficiency of the security. And this course is deemed preferable to that of compelling the first mortgagee to bring ejectment to obtain possession, to be followed by an action for the mesne profits. It is also held, that, in such a case, it is proper to appoint the receiver upon motion of the defendant, the first mortgagee, as against his co-defendant, the mortgagor. And, upon appointing a receiver of mortgaged premises, the court has the right to compel the tenants of

[1] See Bryan *v.* Cormick, 1 Cox, 422; Dalmer *v.* Dashwood, 2 Cox, 378; Tanfield *v.* Irvine, 2 Russ., 149.

[2] Cortleyeu *v.* Hathaway, 3 Stockt., 39; Frisbie *v.* Bateman, 9 C. E. Green, 28, approving and following Best *v.* Schermier, 2 Halst. Ch., 154.

[3] Best *v.* Schermier, 2 Halst. Ch., 154. And the chancellor observed that he had uniformly declined applications for a receiver of rents on the filing of foreclosure bills, upon the ground that the mortgagor was entitled to the rents while in possession by his tenants.

the premises to attorn to the receiver.[1] So when a second mortgagee obtains a decree of foreclosure, but a sale of the property is stayed at the suit of a third person assailing the title to the mortgage, such mortgagee is entitled to a receiver until the determination of the controversy, the mortgagor in possession being insolvent, the taxes and insurance being unpaid, and there being doubt as to the adequacy of the security.[2] But if the rents are being applied in payment of the mortgage indebtedness, taxes, insurance and care of the property, a receiver will not be allowed at the suit of junior mortgagees, the senior mortgagees being content with the management of the property, and not desiring a receiver, even though it is charged that the security is inadequate and the mortgagor insolvent.[3]

[1] Henshaw *v.* Wells, 9 Humph., 568.

[2] Warwick *v.* Hammell, 32 N. J. Eq., 427.

[3] Myton *v.* Davenport, 51 Iowa, 583. As to the duty of a receiver, appointed in a suit for the foreclosure of a junior mortgage of a leasehold interest, to apply the rents in payment of ground rent and taxes upon the premises, see Ranney *v.* Peyser, 20 Hun, 11.

CHAPTER XVI.

OF RECEIVERS IN CASES OF TRUSTS.

I. Principles Governing the Relief.

§ 692. The appointment of receivers is frequently necessary in cases of trusts, either express or implied, as against

trustees and persons occupying fiduciary relations, and the principles governing this branch of the subject may be appropriately referred to the general jurisdiction of courts of equity over trusts. Strictly speaking, many of the cases in which relief is granted by appointing a receiver over corporations, are dependent to a considerable degree upon the doctrine of trusts, the officers of a corporation occupying a fiduciary relation toward its shareholders and creditors, and the abuse of their trust constituting a frequent ground for the interference of equity by a receiver. The principles governing the relief, in such cases, have been elsewhere treated,[1] and it is proposed, in the present chapter, to consider the subject only in its application to cases of express trust, such as those created under wills, cases of executors and administrators, of infancy and of lunacy.

§ 693. It may properly be observed, at the outset, that the courts are averse to the displacement by a receiver of a trustee under an express trust, unless for good cause shown.[2] And equity will not, at the instance of one of several parties interested in an estate, displace a competent trustee in whom the estate has been vested by the testator, and take the possession from him and place it in the hands of a receiver, unless he willfully or ignorantly permits the property to be placed in a condition of insecurity, which might be prevented by due care.[3] So when a trustee has been in possession of the property in controversy in the administration of his trust for many years, upon a bill for his removal the court will not appoint a receiver before answer when it is not shown that there is any great or impending danger to the property or fund, or that plaintiff will suffer irreparable loss by delay.[4] And in an action to set aside an assignment of his goods by a debtor to a trustee for the benefit of

[1] See chapter X, *ante*.

[2] Barkley *v.* Lord Reay, 2 Hare, 306; Hatcher *v.* Massey, 66 Ga., 66; Latham *v.* Chafee, 7 Fed. Rep., 525.

[3] Barkley *v.* Lord Reay, 2 Hare, 306. And see Poythress *v.* Poythress, 16 Ga., 406; Orphan Asylum *v.* McCartee, Hopk. Ch., 429.

[4] Latham *v.* Chafee, 7 Fed. Rep., 525.

creditors, upon the ground of fraud, a receiver will not be appointed over the property held by such trustee pending the determination as to the good faith of such assignment, the fraud being denied and the trustee being solvent and able to respond to any damages which may be recovered against him.[1] But if, in such a case, the defendants are insolvent, and there is probable ground for believing that the goods will be fraudulently disposed of before a hearing upon the merits, a receiver may be allowed, if plaintiff shows a reasonable probability that he will ultimately succeed in the action.[2]

§ 694. When a trust created by a will, to receive the rents and profits of real estate belonging to the testator, devolves upon a court of chancery, there being no person to manage the trust, one of the trustees having died and the others refusing to act, a proper case is presented for the appointment of a receiver to take charge of the rents and profits of the realty, upon a bill filed by an heir-at-law and devisee under the will to have the question of its validity and of his rights thereunder determined. Under such circumstances, a receiver becomes necessary for the preservation of the rents and profits, in order that a proper decree may be made as to their disposition upon the final determination of the suit.[3] And when property, real and personal, has been devised to trustees, to be held upon certain trusts declared in the will, and some of the trustees refuse to act, a receiver may be appointed when all parties in interest are before the court and consent to the appointment.[4]

§ 695. Upon a bill filed by the *cestui que trust* against a testamentary trustee, seeking an account of his trust and a receiver to take charge of the property *ad interim*, the only ground for relief which the court will consider is, whether the trust estate is likely to be wasted before the termination of the litigation. And when this is not shown, the alleged

[1] Levenson *v.* Elson, 88 N. C., 182.

[2] Ellett *v.* Newman, 92 N. C., 519.

[3] McCosker *v.* Brady, 1 Barb. Ch., 329.

[4] Brodie *v.* Barry, 3 Meriv., 695.

bad habits of the trustee, and his unfitness to execute the trust devolved upon him by the testator's will, are not sufficient to warrant a court of equity in the exercise of its extraordinary powers by the appointment of a receiver.[1]

§ 696. In the case of a trust created by an act of legislature and vested in certain public officers, who hold their trust *ex officio*, a portion of the duties required of them being of a public nature, equity is extremely averse to interfering by a receiver, and it must be a very strong case which will justify the court in taking the property out of the control in which it has been placed by the legislature, and putting it into the hands of its own officers. Thus, when the legislature of a state has vested certain public lands belonging to the state in the governor and other state officers as trustees, to constitute an internal improvement fund, and to serve as a guaranty of bonds to be issued by certain railway companies, and the trustees are authorized to fix the prices of the lands, and to make provision for their drainage, settlement and cultivation, the court will not interfere by a receiver except for the most cogent reasons, nor until every other remedy has been tried in vain.[2]

[1] Poythress *v.* Poythress, 16 Ga., 406.

[2] Vose *v.* Reed, 1 Woods, 647. Mr. Justice Bradley observes, p. 651, as follows: "Now these public and political objects of the trust make it extremely fitting that the chief executive officers of the state should administer the fund. And it must be a very strong case, indeed, which will induce the court to take the property out of their hands and put it into the hands of its own officers. The legislature has seen fit to entrust the chief officers of the state with these important duties, and it would show a great disrespect to this co-ordinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in their stead. If they are guilty of breach of duty, they can be enjoined; they can be made personally responsible: the fund can be followed in the hands of persons getting hold of it in a fraudulent manner. It would be very strange if the courts could not in some way secure the rights of parties having an interest in the fund, without removing from the trust those official personages to whose administration it has been entrusted by the legislature. The court will not shut its eyes to the fact that these officers are constantly being changed by the suffrages of the people of the state and the constituted power of appoint-

§ 697. Notwithstanding the aversion already indicated, which courts of equity entertain toward the appointment of receivers to displace trustees except for good cause shown, it has been held, when the object of the action was the removal of a trustee from his trust on the ground of unfitness, that the court might properly appoint a receiver *pendente lite*, the propriety of the relief, in such a case, being regarded as a matter resting in the discretion of the court to which the application was addressed.[1] And when land is devised to a trustee, to hold and manage it and to pay the rents and income to certain beneficiaries, the insolvency of the trustee and his misapplication of the proceeds of sales of the property, and his failure to apply the income in accordance with the terms of the trust, and his appropriation of such income to his own use, constitute sufficient ground for an injunction and a receiver in an action by the beneficiaries for an accounting.[2] So the failure of trustees, to whom leasehold property is devised upon certain specified trusts, to keep the premises in proper repair, and thereby to prevent a forfeiture of the leasehold, has been held to be sufficient ground for appointing a receiver of the rents for the purpose of applying them to needed repairs.[3] And

ment; and it would be very inconvenient and awkward for the court, by the appointment of a receiver, to withhold the property from the possession and management of new state officers, fresh from the confidence of the people, and against whom no charges of incapacity or want of integrity have been made. To my mind it seems to be a case in which, if a receiver can be appointed at all, the appointment ought not to be made until every other remedy has been tried in vain. Besides, looking at the peculiar and important duties attaching to the trust, how could a receiver, how could a court, without the greatest embarrassment, administer the trust? How could the court take cognizance of the requirements of a vast political territory in reference to drainage, development, pre-emption and population? It would be a Herculean task for a court, or the receiver of a court, to perform. I do not feel that I ought to take the trust fund out of the hands of the state officers, in this case, and place it in the hands of a receiver. The motion for a receiver is therefore denied."

[1] Janeway *v.* Green, cited in note to Darrow *v.* Lee, 16 Ab. Pr., 215.

[2] Albright *v.* Albright, 91 N. C., 220.

[3] *In re* Fowler, 16 Ch. D., 723.

when a trustee violates the express conditions of his trust by loaning funds contrary to the provisions of the instrument by which the trust is defined, and by loaning a portion of such funds to a banking firm of which he is a member, and which soon afterward becomes insolvent, sufficient ground is afforded to justify the appointment of a receiver. Nor can the conduct of the trustee, in such case, be justified by the fact that he took securities for the loan which he regarded as good and sufficient at the time.[1] So when lumber is sold to be used in a building upon particular premises, the seller being ignorant that such premises are held in trust by the purchaser, but believing them to be his individual property, and the building erected with such lumber proves beneficial to the trust estate, adding to its permanent value and increasing its rentals, if the trustee is insolvent, a receiver may be appointed to collect the rents, nothing having been paid for the material or for the erection of the building.[2] And under the Supreme Court of Judicature Act in England, when a defaulting trustee has been ordered to pay money into court which is due from him in respect to an alleged breach of trust, and he has gone beyond the jurisdiction of the court, so that the order can not be enforced by attachment, the appointment of a receiver over his property is an appropriate remedy for enforcing the order.[3]

§ 698. Where by his will a testator devises real estate to trustees for the purpose of carrying out the provisions of the will, it is not sufficient ground for appointing a receiver to take the property from the custody of the trustees, that one of them has mingled the trust fund with his own private funds, when it is not alleged that the fund is in danger, and when it is not denied that he keeps a proper account of the fund. And the court will not, in such a case, appoint a re-

[1] North Carolina R. Co. *v.* Wilson, 81 N. C., 223.

[2] Malone *v.* Buice, 60 Ga., 152.

[3] *In re* Coney, 29 Ch. D., 993. See, also, Stanger Leathes *v.* Stanger Leathes, Weekly Notes, 1882, p. 71.

ceiver merely upon the ground that it can be productive of no harm.[1]

§ 699. Upon a bill by an heir-at-law as *cestui que trust*, against a trustee and others to whom the trustee has conveyed real estate in which the plaintiff claims an equitable interest, the object of the bill being to set aside the conveyance as a fraud upon the *cestui que trust*, it is proper for the court to decree that defendants convey the property to a receiver to be appointed by the court, and that such receiver be authorized to sell and convey the lands, and out of the proceeds to pay the amount due to the plaintiff under a former decree against the trustee. And while such a remedy may justly be regarded as a summary one, it is yet a proper exercise of the discretionary powers of a court of equity as against a wrong-doer, and the court will not compel the *cestui que trust* to resort to a sale by execution.[2]

§ 700. When personal property has been bequeathed to defendant's wife, with an executory devise over to plaintiff upon the death of defendant's wife without issue, and upon such death defendant, the husband, takes possession of the property, the devisee is entitled to a receiver, in an action for an accounting and to recover possession of the property, upon showing that the defendant in possession is irresponsible, having conveyed away his real estate and having no property subject to execution. Under such circumstances, the danger to the fund in controversy is regarded as sufficient ground for the interposition of a court of equity *pendente lite*.[3]

§ 701. While there are frequent instances where the English Court of Chancery allowed receivers, pending litigation as to the probate of a will, when the relief was necessary for the preservation of the estate, the fact that,

[1] Orphan Asylum *v.* McCartee, Hopk. Ch., 429.

[2] Gunn *v.* Blair, 9 Wis., 352.

[3] Ladd *v.* Harvey, 21 N. H., 514. As to the circumstances which will justify a court in appointing a receiver over real estate held in trust for a wife who is entitled to a portion of the annual income therefrom, see Robert *v.* Tift, 60 Ga., 566.

after a will has been duly admitted to probate, litigation is instituted to recall or revoke the probate, does not of itself constitute sufficient ground to justify a court of equity in interfering by a receiver with the possession of the parties entitled thereto under the probate.[1]

§ 702. Where there are different parties in interest in the profits of a contract for the performance of certain public work, and a trustee has been appointed to receive the money due thereon and to pay it over to the parties in interest, a receiver will not be appointed to take charge of the contract upon the application of one only of the parties, who holds but a small interest, and when it is manifest to the court that the appointment may result in destroying the value of the contract, and when no misconduct is shown against the trustee.[2]

§ 703. Courts of equity have always been extremely averse to the appointment as receivers of persons occupying fiduciary relations toward the property or estate forming the subject-matter of the receivership, and as a general rule, a trustee of an estate will not be appointed receiver for its management.[3] The reason for the rule is found in the fact that the court expects a trustee to watch the proceedings with an adverse eye, to see that the receiver does his duty.[4] Where, however, considering the trustee's knowledge of the estate, it seems advisable and for the best interests of the estate that he should be appointed, a departure from the rule is allowable, but only upon condition that he shall receive no compensation for his services as receiver.[5]

§ 704. When real estate has been devised to trustees upon certain specified trusts, and a receiver of the estate is appointed upon the ground of their misconduct and inca-

[1] Newton *v.* Ricketts, 10 Beav., 525.

[2] Devlin *v.* Hope, 16 Ab. Pr., 314.

[3] ——— *v.* Jolland, 8 Ves., 72; Sykes *v.* Hastings, 11 Ves., 363; Sutton *v.* Jones, 15 Ves., 584.

[4] Sykes *v.* Hastings, 11 Ves., 363.

[5] Hibbert *v.* Jenkins, cited in Sykes *v.* Hastings, 11 Ves., 363. See, also, Newport *v.* Bury, 23 Beav., 30.

pacity, it is proper, upon the appointment of new trustees, that the management of the estate should be transferred from the receiver to such new trustees, and the court will so order, if satisfied that it may be done without injury to the legatees under the will, and when it is apparent that it will result to the advantage of the estate by doing away with the expense of the receivership.[1]

§ 705. A receiver has been appointed over a government pension, which had been paid through a trustee, when the trustee had refused payment, and had put a stop to the pension and then gone beyond the jurisdiction of the court.[2]

[1] Bainbrigge *v.* Blair, 3 Beav., 421.

[2] Noad *v.* Backhouse, 2 Y. & C. C. C., 529.

II. Receivers Over Executors and Administrators.

§ 706. The jurisdiction of equity by the appointment of receivers over executors and administrators, upon the ground of an abuse of their trust, although well established, is nevertheless exercised with extreme caution, and the courts are exceedingly averse to granting the relief unless in press-

ing cases, since it is for the testator to say in whom the management of his estate shall be vested after his decease.[1] And while courts of equity have unquestioned power, in a proper case, to take the administration of the estate of a decedent out of the hands of his administrator or executor, and to manage it by a receiver, this summary relief should only be granted in cases of manifest danger of loss, destruction or material injury to the estate. It is only under extraordinary circumstances that equity will thus wrest the administration from the hands of the legal representative, and place it in the hands of a receiver, and the interference can be justified only by evidence of gross misconduct or personal disability.[2] And the principle on which the relief is granted, in this class of cases, is said to rest on the doctrine of *quia timet*, the interference being justified for the prevention of a future and probable injury, and not to redress a grievance which has already occurred.[3] It is, therefore, necessary that a strong case should be shown of imminent danger to the estate unless a receiver is appointed. And when the bill fails to show any immediate danger of waste, or of any wrong which the probate court may not effectually prevent, and the charges of the bill are wanting in certainty, a court of equity will not interpose its extraordinary aid by appointing a receiver.[4]

[1] See Powell *v.* Quinn, 49 Ga., 523; Harrup *v.* Winslet, 37 Ga., 655; Dougherty *v.* McDougald, 10 Ga., 121; Stairley *v.* Rabe, McMul. Eq., 22; Brooker *v.* Brooker, 3 Sm. & G., 475; Hervey *v.* Fitzpatrick, Kay, 421; Middleton *v.* Dodswell, 13 Ves., 266; Rendall *v.* Rendall, 1 Hare, 152; Steele *v.* Cobham, L. R., 1 Ch. App., 325; Haines *v.* Carpenter, 1 Woods, 262.

[2] Harrup *v.* Winslet, 37 Ga., 655; Dougherty *v.* McDougald, 10 Ga., 121; Brooker *v.* Brooker, 3 Sm. & G., 475.

[3] Dougherty *v.* McDougald, 10 Ga., 121.

[4] Powell *v.* Quinn, 49 Ga., 523. McCay, J., observes, p. 529: "It ought to be a very strong case indeed to justify a chancellor in appointing a receiver and taking the assets of an estate out of the hands of an administrator duly appointed by the court of ordinary. The ordinary has constitutional jurisdiction over the subject-matter, and special reasons should appear why that jurisdiction does not answer the ends of justice. The ordinary

§ 707. An executor, duly appointed by the will of a testator, who has qualified in the proper court and given bond for the faithful performance of his duties, and who has entered upon the performance of his trust and is in possession of the estate, will not be displaced upon slight grounds, and a strong case must be made out to warrant equity in interfering if the executor is willing to act. It does not follow, because a suit is instituted against him by a person claiming an interest in the estate, that the trust created by the testator is to be set aside. And where a devisee, claiming an interest in the estate, files a bill against the executor, to enforce the trusts of the will, and seeks a receiver upon the ground of the executor's incompetency and mismanagement, and alleges that he is endeavoring to defeat the bequest to plaintiff, and that he has confederated with others to institute fictitious suits against the estate to swallow up the assets, the court will not appoint a receiver if these charges are made only upon information and belief, and are not supported by affidavits. And even though a danger to the trust property is established, that alone will not suffice, but it must also appear that the defendant executor in possession is irresponsible.[1]

may discharge an administrator and appoint another; he may require new security, and he may compel the delinquent administrator to account and deliver up the property as well as a court of chancery can do it. There is no charge in this bill, as far as the assets of Mrs. Victoria Quinn's estate are concerned, that shows any immediate imminent danger of waste, or of any wrong which the ordinary may not effectually grapple with and prevent. The charges in the bill are wanting in certainty, and it would be dangerous to use the extraordinary power of appointing a receiver on such allegations. Fraud is charged, and misrepresentation in obtaining the letters, but no specification is made, no facts detailed. This is entirely too loose and indefinite."

[1] Haines v. Carpenter, 1 Woods, 262. The principles governing, in such case, are very clearly stated in the opinion of Mr. Justice Woods, as follows, p. 265: "The party in possession of the property for which a receiver is asked is the executor named in the will of the testatrix, who has qualified in the probate court and given bond for the faithful discharge of his trust. Under these circumstances, the court should not displace him upon light

§ 708. While, as is thus seen, a strong case of abuse of trust or mismanagement must be made out to warrant a court of equity in granting a receiver, as against an executor of an estate designated by the testator's will, yet when the abuse of the trust is manifest, and it is plainly apparent that there have been serious waste and misappropriation of the funds, equity may properly interfere by a receiver.[1] Especially is this true when the mismanagement is shown, not in a single instance, but from an habitual course of dealing, involving the property in danger, and when the other executors consent to the appointment. The court, in such case, treats an executor like any other trustee, and will take

grounds. And though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator is to be set aside. A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act. The grounds upon which this court is asked to dispossess the executor and turn over the property of the succession to a trustee, are that Carpenter, the executor, is unfit and incompetent to manage and successfully control the estate; that he has only cultivated a part of the land susceptible of cultivation, when, in the opinion of the complainants, all of it should have been cultivated; that he is endeavoring to defeat the bequest to the said Baptist church by depreciating the value of the estate, and that he is confederating with said Elias S. Dennis to institute fictitious suits against the estate, in order to sweep away its assets. These charges are not directly made, but are stated on the information and belief of complainants, and they are not supported by a single affidavit to any fact. The application to appoint a receiver must be supported by evidence showing that the appointment is necessary. There is absolutely no testimony to support the application in this case. It is true that one of the complainants swears to the bill, but in doing so he only swears that he has been informed of and believes certain statements in his bill. This is not evidence, and gives no support to the application. The fact is that the court is asked to appoint a receiver, in this case, on mere rumor, without any proof showing the necessity of the appointment. But even if the fact were established that the trust property was in danger, that, of itself, would not be sufficient. It must be further shown that the party in possession is irresponsible. There is no proof that the executor is irresponsible, or his bond insufficient, nor is there any averment in the bill to that effect. The motion for a receiver must, therefore, be overruled."

[1] Middleton *v.* Dodswell, 13 Ves., 266; Stairley *v.* Rabe, McMul. Eq., 22.

from his hands the management of the trust if he has been guilty of waste and gross mismanagement. And in such case, the appointment may be made before defendant has answered.[1] So when, after the death of a testator, his widow becomes executrix under the will, and she afterward marries and entrusts the management of the estate to her husband, who is incapable of properly conducting it, and under whose supervision the funds are misappropriated, and the estate is involved in debt, an appropriate case is presented for a receiver upon application of the minor heirs of the deceased.[2] And when an executor has, upon his own admission, wasted and misappropriated the trust funds in his hands, and refuses to disclose how and where he has done so, and has permitted a co-executor also to misappropriate the funds, such a breach of trust is shown as to clearly require the court to take the management of the estate out of the executor's hands by placing it in the hands of a receiver. In such case, the assets of the estate will be delivered to the receiver, and the debts will be paid to him, but this only extends to assets and property within the state and debts due from residents of the state, or secured upon property therein.[3] So if the conduct of an administrator is such as to hinder and impede the collection of the debts due to the estate, a receiver may be appointed to collect and hold the assets, and the court, in such case, may retain jurisdiction for the purpose of finally settling the estate.[4] And when an executor converts both the real and personal estate into money and notes, thus giving rise to a reasonable apprehension that the estate is not sufficiently secured, in an action against him for an accounting and settlement of his trust, the court may properly order that he give a bond for the protection of the estate, and to secure the perform-

[1] Middleton *v.* Dodswell, 13 Ves., 266.

[2] Stairley *v.* Rabe, McMul. Eq., 22.

[3] Price's Executrix *v.* Price's Executors, 8 C. E. Green, 428.

[4] Du Val *v.* Marshall, 30 Ark., 230.

ance of whatever decree may be finally recovered against him, or, in default thereof, that a receiver be appointed.[1]

§ 709. Equity will not interfere by a receiver with the management of an estate in the hands of executors merely upon the ground of their poverty, or because they are not in affluent circumstances, when no suggestion is made of improper conduct, especially where this was the condition of the executor at the time of his appointment; since the interference upon such ground would have the effect of changing the trust created by the will, although no misbehavior was shown. Unless, therefore, some misconduct or negligence is shown on the part of the executor, or some danger of a loss for which he will not be able to respond by reason of his poverty, the court will not transfer the management of the estate from his hands to those of a receiver.[2] And when the charges of the bill, as to insolvency and mismanagement of the business by the defendant executor, are fully and completely denied by his answer, a receiver should not be allowed.[3]

§ 710. Where, however, in addition to insolvency, serious

[1] Gray *v.* Gaither, 74 N. C., 237.

[2] Knight *v.* Duplessis, 1 Ves., 324; Howard *v.* Papera, 1 Madd., 141, 1st American edition, p. 86; Fairbairn *v.* Fisher, 4 Jones Eq., 390; Johns *v.* Johns, 23 Ga., 31; Anonymous, 12 Ves., 4. The case last cited was a motion made before answer for a receiver, upon the ground that the executrix had no other property than an annuity of £20, given to her by the testator. Sir William Grant, Master of the Rolls, observes, p. 5: "There is no doubt that in several instances, as if the executor has wasted the effects, or in other respects misconducted himself, this court will interfere; but has the court ever taken the disposition out of the hands of the executor on account of his mean circumstances; for it comes to that? You must prove the unfitness of the person. In this case, the only ground is that she is not a person of property. . . The allegation goes no further than that this executrix is in mean circumstances. If any misconduct, waste, or improper disposition of the assets were shown, the court would instantly interfere; but at present no case is made for a receiver." See as to the effect of an executor having engaged in a hazardous business as ground for a receiver *pendente lite*, Bowling *v.* Scales, 2 Tenn. Ch., 63.

[3] Fairbairn *v.* Fisher, 4 Jones Eq., 390.

misconduct is shown on the part of the executor, as well as danger of loss to the estate, a different case is presented, and the court may properly interfere by a receiver to prevent the assets from being wasted. Thus, upon a bill filed in behalf of the heirs of an estate, showing great and unnecessary delay by the executors in settling the estate; that some of the heirs have received large sums in excess of their just proportion; that some of the executors have misapplied funds; and that three of the four executors are insolvent, a fitting case is presented for the interference of equity by a receiver. Under such circumstances, the receiver is appointed in lieu of the insolvent executors, to act with the solvent executor if the latter will consent so to act; otherwise he is appointed generally, to act in lieu of them all. And the executors will be required to deliver over to the receiver, under oath, all books, vouchers, securities, title deeds, property and money belonging to the estate.[1]

§ 711. While, as already shown, mere insolvency of an executor is not of itself sufficient ground for a receiver, an actual adjudication in bankruptcy presents much stronger ground for the relief. And where a sole executor and trustee of the estate of a deceased testator has been adjudged bankrupt, upon his own petition, and assignees of his estate have been appointed, a receiver may be allowed on the ground that there is no person to protect the assets, the assignees of the bankrupt executor having no power to interfere with the trust estate. And it is not a sufficient objection to the relief, in such a case, that the assignees have not been brought before the court.[2] So where an executor had become bankrupt, a receiver was appointed of the rents and profits of the real estate, but without prejudice to an application by the next of kin for a receiver of the personalty when the will should be proven.[3]

[1] Jenkins v. Jenkins, 1 Paige, 243.

[2] Steele v. Cobham, L. R., 1 Ch. App., 325.

[3] Gladdon v. Stoneman, 1 Madd., 141, 1st American edition, 86, note a. See, also, Langley v. Hawk, 5 Madd., 46, 1st American edition, 36.

§ 712. The removal of an executor from the state, leaving both his *cestui que trust* and the trust estate within the state, is sufficient ground for the interference of equity by a receiver, upon the application of the *cestui que trust.* The court proceeds, in such a case, upon the ground that there is an abandonment of his trust on the part of the executor, and as his removal places him beyond the jurisdiction of the court and out of reach of its process, he is no longer liable to account. It is, therefore, the duty of the court to see that such removal or abandonment does not prejudice the beneficiaries of the estate, and for this purpose to grant them the aid of a receiver.[1]

§ 713. The aid of a receiver was sometimes granted by the English Court of Chancery, as against executors or administrators of an estate situated in a foreign country. Thus, where a person claiming to be administrator of an estate situated in a foreign country had come within the jurisdiction of the court of chancery, and had brought with him a portion of the estate, a receiver was appointed *pen-*

[1] *Ex parte* Galluchat, 1 Hill Eq., 148. The court, O'Neall, J., say, p. 151: "As long as the executor remains within the jurisdiction of the court, the court would not, unless under very extraordinary circumstances, deprive him of the management of the trust; yet when he removes from the state, will the court permit him, either to remove the trust estate, or manage it? His removal places him beyond the process of the court, and he is no longer liable to account to it. His removal of the trust estate might enable him to defeat the trust, and his management of it by attorney might place it in irresponsible hands and have the same effect. In some cases, as when the executor and his *cestui que trusts* remove together, the court would permit him to remove the trust estate, and it may be that, under circumstances showing that it was for the benefit of the estate, the court would not interfere to prevent the attorney of an executor who has removed from the state, from managing the trust estate. But generally, when an executor removes from a state, leaving both his *cestui que trusts* and the trust estate in the state, it is the duty of the court of equity, on the application of the *cestui que trusts,* to appoint a receiver. For there would, in such a case, be an abandonment of the trust, voluntary it is true, on the part of the executor, and which can not, therefore, benefit him, but which the court will take care shall not prejudice the *cestui que trusts.*"

dente lite, upon a bill by the English administrator to prevent the removal of the assets beyond the jurisdiction of the court, although no misconduct was alleged against the defendant.[1] So an executor residing in England, the assets of the deceased being in India, and a co-executor in India having died, was allowed a receiver of the property in India, but was required to give sureties resident in England.[2] And when the devisee in trust and the executors of the will of a deceased testator resided beyond the jurisdiction of the court, but all of the realty and part of the personalty were in England, a devisee and legatee under the will resident in England was allowed a receiver to take charge of the estate.[3]

§ 714. Under the practice of the English Court of Chancery, receivers were sometimes appointed for the preservation of an estate, pending a contest in the ecclesiastical courts over the probate of the estate and the right to administer.[4] And while that court proceeded with extreme caution in granting a receiver as against an executor in possession, when it was not yet apparent who had the actual right to administer the estate, yet when there was a *bona fide* litigation pending in the ecclesiastical court to determine the right to probate or to administer, the court of chancery would properly interfere by a receiver, not because of the contest over the probate, but because there was no proper person, pending such contest, to receive the assets.[5] Thus, upon a bill by one claiming to be an executor, showing that a contest was pending in the ecclesiastical courts as to whether the deceased left any testamentary disposition of his property, and that, pending such contest, there was no person legally entitled to receive any part of the effects of

[1] Hervey *v.* Fitzpatrick, Kay, 421.

[2] Cockburn *v.* Raphael, 2 Sim. & St., 453.

[3] Smith *v.* Smith, 10 Hare, Appendix, lxxi.

[4] See Rendall *v.* Rendall, 1 Hare, 152; Wood *v.* Hitchings, 2 Beav., 289; Anderson *v.* Guichard, 9 Hare, 275.

[5] Rendall *v.* Rendall, 1 Hare, 152; Wood *v.* Hitchings, 2 Beav., 289. See S. C., 3 Beav., 504.

the deceased, the court would grant a receiver.[1] The main question, in such case, was, whether it was necessary for the protection of the interests of all persons concerned that there should be a receiver, and the jurisdiction of equity for this purpose being clear, it afforded no objection to the exercise of that jurisdiction that there was no person in whose name an action might be brought to recover the property. Nor was it a sufficient objection to the motion for a receiver, that the bill was, to a considerable extent, a bill for discovery.[2] But where a controversy was pending between different executors of the same estate, and the right to probate the estate was in contest in the proper court, and an application was made for a receiver *pendente lite*, who was appointed, it was held that there was no necessity for bringing such application to a final hearing, and that such a practice was without precedent.[3]

§ 715. The aid of a receiver is sometimes invoked in behalf of judgment creditors against executors. And when judgment creditors of the estate of a deceased person show by their bill that the executor, who has been removed from his trust, has, by false and fraudulent representations, possessed himself of a large fund belonging to the estate, which he has misapplied, and that he is wholly irresponsible and insolvent, they are entitled to a receiver to take charge of the fund. Such a case is regarded as presenting strong grounds for the interposition of equity under its general power over trusts and trust estates, in the exercise of which power a receiver is frequently indispensable.[4] And when a

[1] Wood *v.* Hitchings, 2 Beav., 289. See S. C., 3 Beav., 504.

[2] Wood *v.* Hitchings, 2 Beav., 289. See S. C., 3 Beav., 504.

[3] Anderson *v.* Guichard, 9 Hare, 275.

[4] *Ex parte* Walker, 25 Ala., 81. "Nothing is more common in chancery practice," say the court, Chilton, C. J., p. 104, "than the appointment of receivers in suits against executors, where there is danger to the fund without such appointment; so, also, if he has wasted the effects, or in other respects has misconducted himself. Although mere poverty, of itself, may not furnish sufficient ground for the appointment of a receiver, as against an executor, yet where

judgment creditor of a deceased debtor files a bill against the executor, showing that he has given no security, that he is insolvent and of extravagant habits, and that he is mismanaging the estate and is about to leave the country, and praying an injunction and a receiver, it is error to dismiss the bill, no answer being filed and its equities not being denied.[1]

§ 716. Where, however, a judgment is obtained against a debtor and a creditor's bill is filed thereon during his lifetime, and after his death the creditor's suit is revived against his administrator, a receiver will not be appointed over the effects of the deceased on the application of plaintiff in the creditor's suit. In such case, the assets are to be disposed of in due course of administration, according to the laws of the state, and the priority which plaintiff may have gained by filing his bill dies with the defendant, and a receiver, in such case, is both unnecessary and would interfere with the due course of administration.[2] But it is held that if a receiver had already been appointed, and had obtained possession of property or money belonging to the debtor, before his death, the court appointing him, having possession through its officer, would not part with that possession to the executor or administrator, but would apply the fund in payment of the debt, due regard being had to the statutory rights of other creditors.[3]

§ 717. When a judgment is obtained against an administratrix in her personal capacity, and a receiver is appointed over her effects in aid of the judgment creditor, such receiver is not entitled to the rents due to the administratrix

it is coupled with other facts or circumstances, showing that he has proceeded not in accordance with law (as where he has made private sales of the property of the estate, or is dealing with it on his private account), especially where it is doubtful whether he is, in fact, the legal representative, or is not shorn of his authority by removal, the court, in all such cases, should promptly secure the effects by placing them in the hands of a receiver."

[1] Chappell v. Akin, 39 Ga., 177.

[2] Sylvester v. Reed, 3 Edw. Ch., 296; Mathews v. Neilson, id., 346.

[3] Mathews v. Neilson, 3 Edw. Ch., 346.

in her representative capacity. And in such case, tenants of the estate have a right of action to recover back money thus improperly paid, and having assigned such right of action to the administratrix, she may maintain the action for the benefit of the estate.[1]

§ 718. The death of one of two executors, and the refusal of the other to act, afford abundant reason for the interference of equity by appointing a receiver to take charge of the assets, upon the application of persons beneficially interested in the estate.[2] But the mere fact of a misunderstanding existing between two executors, as to the management of the estate entrusted to their charge, is not sufficient ground for a receiver to take the control of the estate out of their hands.[3] If, however, a receiver is appointed upon the ground of the misconduct of one of two executors, his co-executor not having qualified as such until after such misconduct, but before the appointment of the receiver, the management of the estate will not be restored to such co-executor when he has acquiesced in the appointment without objection or appeal.[4]

§ 719. A receiver has been allowed for the purpose of effecting a sale of real estate of a deceased person, which he had devised to his executors, but in which plaintiff was equitably interested under an agreement with the deceased for a proportion of the profits arising from a sale of the premises. And in such a case, the ground for relief would seem to be, that the executors occupy to a certain extent a possession adverse to that of the plaintiff, rendering it necessary that an impartial person be appointed to make the sale.[5]

§ 720. Upon a bill filed against an executor for a receiver, upon the ground of his alleged waste and misman-

[1] Barker *v.* Clark, 12 Ab. Pr., N. S., 106.

[2] Palmer *v.* Wright, 10 Beav., 234.

[3] Fairbairn *v.* Fisher, 4 Jones Eq., 390.

[4] Fraser *v.* City Council, 19 S. C., 384.

[5] Marvine *v.* Drexel's Executors, 68 Pa. St., 362.

agement of the estate, it is not competent for the court to look into the accuracy of the executor's account rendered to the probate court, with a view to support the grounds made by the bill for a receiver. In such case, the probate court, being the appropriate tribunal to act upon the executor's account, a court of chancery will not base any action upon such account, having no control or jurisdiction in the premises.[1]

§ 721. Equity will not entertain a bill in behalf of a surety upon the official bond of an administrator, to compel the administrator to give security to plaintiff for his obligation of suretyship, or in default thereof that a receiver be appointed of the estate in the administrator's hands. Such a case presents no ground for the aid of a receiver, unless the relief should become necessary for the protection of minor heirs of the estate upon the refusal of the probate court to appoint guardians of such minors.[2] And a surety for a debt due from one who has died intestate can not maintain an action for a receiver to collect the assets and to administer the estate of the deceased, against persons improperly controlling or managing the assets, without authority.[3]

§ 722. When a ward, through her guardian, files a bill against the administrator of the estate, showing that she is entitled, under a previous decree, to a specific interest in certain lands held by the administrator, a receiver may be appointed to take charge of the land, the bill showing that the administrator is committing waste, and that he and his sureties are wholly insolvent.[4]

[1] Simmons *v.* Henderson, Freem. (Miss.), 493.

[2] Delaney *v.* Tipton, 3 Hayw. (Tenn.), 14.

[3] Walker *v.* Drew, 20 Fla., 908. As to the circumstances which will warrant a receiver over real estate which has once been sold by an administrator, upon a bill by sureties upon a bond given for the purchase money at such sale, the administrator being insolvent and in possession of the land, see Stenhouse *v.* Davis, 82 N. C., 432.

[4] Ware *v.* Ware, 42 Ga., 408. The court, Lochrane, C. J., say, p. 411: "The decree gives a specific interest in this property to the com-

§ 723. Where a receiver had been appointed because of the refusal of certain executors to act under the will of the testator, but he subsequently removed from the country, and the executors were willing to act, instead of appointing a new receiver the court ordered the executors to act, and directed the receiver to pass his accounts.[1]

§ 724. While a court of equity, as has been shown, may, in proper cases, enjoin an executor from proceeding further with his duties, and may appoint a receiver to take charge of the estate, to be administered under the direction of the court, such appointment does not have the effect of removing the executor, since the power of removal is not within the jurisdiction of equity, but rests in the probate courts.[2] And a receiver appointed over the estate of a deceased person has no authority to interfere with suits pending against the executor at the time of such appointment, unless authorized by the court so to do; and, in the absence of such authority, he will be treated as a stranger to such suits

plainant to the amount of $2,850, and operates as a conveyance to that effect. The character of the litigation now develops just such a case as belongs particularly to a court of equity to take jurisdiction of and determine. This ward may be delayed in the recovery of her rights, after adjudication by the courts, interminably by the introduction of new matters arising out of the facts disclosed by the record, unless the chancellor lays his hands on this property and compels all parties in interest to come forward and present their respective claims for adjudication and settlement. It would end in a multiplicity of difficulties to refuse now to examine the jurisdiction invoked and interposed by proper process to compel a settlement of the interest by decree vested in this ward. And we therefore reverse the judgment of the court below dismissing the bill for want of equity, and direct him to appoint a proper receiver, who shall take custody of the property, protect the same from waste and injury, and that all parties in interest be cited to appear, and be made parties to this bill, and the property sold for the purpose of division among the claimants."

[1] Davy *v.* Gronow, 14 L. J., N. S. Ch., 134.

[2] Leddel's Executor *v.* Starr, 4 C. E. Green, 159.

[3] Gadsden *v.* Whaley, 14 S. C., 210.

III. Receivers Over Estates of Infants.

§ 725. The appointment of receivers for the protection of the property rights of infants, as against executors or other persons occupying fiduciary relations toward the infant's estate, rests upon the general doctrine of trusts already discussed, and is governed by the same general principles. And while courts of equity are averse to interfering with the management of estates by executors, even in behalf of infants, a receiver will be granted in a clear case of mismanagement and misappropriation of the funds, or of hazard to the infant's estate. Thus, when an executrix entrusts the control of the estate to her husband, who is incapable of properly managing the trust, and under whose supervision the funds are misappropriated and the estate is involved in debt, a fitting case is presented for a receiver upon the application of minor heirs of the deceased testator.[1]

§ 726. The relief, in this class of cases, has been more frequently granted under the English practice than in this

[1] Stairley *v.* Rabe, McMul. Eq., 22. As to the powers and functions of a receiver over the estate of a ward upon the removal of a guardian, under the statutes of North Carolina, see Temple *v.* Williams, 91 N. C., 82.

country, and the jurisdiction has been well settled in that country from an early period. And upon a bill by an infant tenant in tail of an estate which had been in possession of an executor, it appearing that the executor had absconded for a period of over two years, and that there was danger of the property being lost for want of management, it was regarded as a strong case for a receiver.[1]

§ 727. When a testator has devised his property to several trustees to carry out certain trusts specified in his will, a receiver of the estate will not be appointed in behalf of infant heirs merely because one of the trustees has disclaimed or refused to act, since the court will not presume misconduct on the part of the other trustees.[2] But where there were two trustees of an estate, one of whom had never acted and declined so to do, a receiver was appointed of the rents and profits in behalf of infant *cestui que trusts*, although the other trustee was desirous of acting.[3]

§ 728. The necessity of protecting an infant's property and estate, when it is not vested in a trustee, but is in the adverse possession of a person hostile to the infant's interests, may afford sufficient ground for the interference of equity by a receiver. Thus, when an infant has purchased a stock of goods for purposes of trade, and has mortgaged them to secure payment of a portion of the purchase money, and the mortgagee upon default takes possession of all the goods in plaintiff's store, including other goods not covered by the mortgage, in an action by the infant to disaffirm the contract, although the mortgagee is entitled to the goods which he had sold to the infant, yet there being a mixture

[1] Pitcher *v.* Helliar, Dick., 580. And Lord Thurlow observed, in this case, that he would have ordered a receiver, even if there had been no bill filed. But in Anonymous, 1 Atk., 489, it was said that there was no instance of appointing a receiver of the rents and profits of an infant's estate, when there was no bill depending in court; but that if it were only filed, there might be an application for a receiver on behalf of the infants. See, also, *Ex parte* Whitfield, 2 Atk., 315.

[2] Browell *v.* Reed, 1 Hare, 434.

[3] Tait *v.* Jenkins, 1 Y. & C. C. C., 492.

of the property, and defendant being in possession and claiming a right to sell the whole for his own benefit, a receiver may be allowed until the respective rights of the parties can be ascertained.[1]

§ 729. As regards the selection of a proper person to be appointed receiver of an infant's estate, it is generally held that one who sustains a relation of trust toward the infant is ineligible as receiver, the two characters being incompatible.[2] Thus, when a bill is filed by the next friend of infants against the executors of an estate for an accounting and a receiver, the next friend is not regarded as a proper person to be appointed, since it is his duty to watch the accounts and conduct of the receiver, and the two characters are incompatible, and can not be united in the same person.[3] So a trustee and executor of an estate devised to an infant is not ordinarily eligible as receiver of the estate; and this is so, regardless of whether he is a sole trustee, or whether there are others joined with him as co-trustees.[4] But where a testator had appointed as trustee and executor of his will a person who had for many years acted as receiver of a portion of his property, he was regarded as a proper person to be continued as receiver for the protection of an infant tenant for life.[5]

§ 730. Where a receiver is appointed over the estate of an infant during his minority, the infant having no guardian, and the receiver is directed by the decree to place the surplus rents and profits during infancy at interest, as fast as they amount to a sufficient sum for investment, if he fails thus to invest the funds he will be liable for interest. And in such a case, the fact that the infant, immediately on coming of age, has a settlement with the receiver, and, after looking over the accounts, admits the balance in the re-

[1] Skinner *v.* Maxwell, 66 N. C., 45. See S. C., 68 N. C., 400.

[2] Stone *v.* Wishart, 2 Madd., 63, 1st American Edition, 374; ——— *v.* Jolland, 8 Ves., 72. See, also, Sykes *v.* Hastings, 11 Ves., 363.

[3] Stone *v.* Wishart, 2 Madd., 63, 1st American Edition, 374.

[4] ——— *v.* Jolland, 8 Ves., 72. See, also, Sykes *v.* Hastings, 11 Ves., 363.

[5] Newport *v.* Bury, 23 Beav., 30.

ceiver's hands to be correct, and receives it without objection, is no bar to charging the receiver with the interest.[1]

§ 731. In the Irish Court of Chancery, a receiver of a minor's estate has been authorized by order of court to expend money belonging to the estate for the relief of tenants who were in destitute circumstances, and where, owing to the failure of their crops, they were in an impoverished condition.[2]

§ 732. A receiver appointed for the protection of the estate of infants will not be discharged until the object of his appointment has been fully attained. Thus, as between tenants in common of real estate, two of whom are infants, when a receiver is appointed for the protection of the infants, with directions to pay to the adults their share, he will not be discharged upon the application of one of the infants on his coming of age, the other not yet having attained his majority.[3]

[1] Hicks *v.* Hicks, 3 Atk., 274.
[2] Jackson *v.* Jackson, 2 Hog., 238.
[3] Smith *v.* Lyster, 4 Beav., 227.

IV. Receivers Over Estates of Lunatics.

§ 733. A receiver is sometimes necessary for the preservation of the estate of a lunatic, and while there are but few reported cases bearing upon this subject, the power of a court of equity to thus interfere is unquestioned. Upon the death of a lunatic or insane person whose property has been managed by a trustee or committee appointed by the court in conformity with the laws of the state, since the trustee's functions terminate with the death of the lunatic, it is proper for a court of chancery to appoint a receiver to take charge of the assets and estate until it may be determined who is entitled thereto.[1] But the object of the appointment, in such case, being the protection of the estate until it may be determined who is properly entitled to possession, the receiver will be continued only while such necessity exists. And when the proper court of probate has acquired jurisdiction over the estate of the deceased, and has appointed an administrator *pendente lite*, the court of chancery will surrender the possession of its receiver, and will deliver the property to the administrator *pendente lite*.[2]

§ 734. The relief, in this class of cases, would seem to be largely a question of judicial discretion. And after the death of a lunatic, whose estate had been in her life-time managed by a committee, there being two rival claimants as heirs of the estate, each of whom filed a bill for a re-

[1] *In re* Rachel Colvin, 3 Md. Ch., 288.

[2] *In re* Rachel Colvin, 3 Md. Ch., 288.

ceiver of the estate pending the litigation as to their rights, the English Court of Chancery declined to interfere by the exercise of its original jurisdiction for the appointment of a receiver, treating the case as if there had been no lunacy, and allowing the application to be made in the first instance before the vice-chancellor.[1]

§ 735. One who sustains such a relation toward the estate of a lunatic as to make it his duty to call the receiver to an account is not, upon general principles of equity, eligible as a receiver. Hence a solicitor under a commission of lunacy should not be appointed receiver of the lunatic's estate.[2]

§ 736. In the case of a receivership over the estate of a lunatic, when the receiver has never made a full or complete report of the income and disbursements of the estate committed to his charge, any party to the cause is entitled to move for such an account, which it is the receiver's plain duty to make in his capacity as an officer of the court. And the court may thereupon order a full account to be taken *instanter* on proper notice. And it may also order a reference to ascertain and report as to the situation of the lunatic's property; the liens, if any, upon it; the existing debts; the probable income for the ensuing year, and the probable charges thereon. The reference may also be directed to ascertain what amount of the income from the estate will be needed for the comfortable support of the lunatic, whose interests are to be first guarded.[3]

[1] *In re* Ferrior, L. R., 3 Ch. App., 175. See Carrow *v.* Ferrior, id., 719.

[2] *Ex parte* Pincke, 2 Meriv., 452.

[3] Lowe *v.* Lowe, 1 Tenn. Ch., 515.

CHAPTER XVII.

OF RECEIVERS IN CONNECTION WITH INJUNCTIONS.

I. The Remedies Compared.

§ 737. The discussion of the law of receivers, as thus far developed, has shown many striking points of resemblance between this branch of the extraordinary jurisdiction of equity, and that which is invoked in the granting of preliminary or interlocutory injunctions. The two remedies are alike branches of the general preventive jurisdiction of courts of equity, and are prospective rather than retrospective in

their operation, being invoked on suitable occasions for the prevention of future injuries, rather than for the redress of grievances already committed. Thus, the object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining the questions of right involved, it seeks to prevent the further perpetration of wrong, or the doing of any threatened act which may result in injury to the rights of the party complaining.[1] So the object sought in appointing a receiver *pendente lite* is to prevent injury to the thing in controversy, the *res*, and to preserve it unimpaired for the security of all parties in interest, that it may be disposed of in accordance with the final decree of the court.[2] Both are extraordinary remedies in the strict sense of the term, as distinguished from the usual and accustomed modes of procedure at law and in equity, since they seize upon and control the subject-matter of the litigation *in limine*, and without awaiting the final determination of the court, or its final process. Neither remedy has the effect of changing the title, or of creating any special lien upon the property, their common object being only to secure its preservation, until the rights of all parties in interest may be fully ascertained and judicially determined.[3] And both remedies rest, to a considerable extent, in the sound judicial discretion of the court to which the application is addressed, to be governed by a consideration of all the circumstances of the case.[4]

[1] See Murdock's Case, 2 Bland, 461; Bosley *v.* Susquehanna Canal, 3 Bland, 63.

[2] Mays *v.* Rose, Freem. (Miss.), 703.

[3] Ellis *v.* Boston, Hartford & Erie R. Co., 107 Mass., 1.

[4] See, as to this element of discretion on applications for interlocutory injunctions, United States *v.* Duluth, 1 Dillon's C. C., 469; Reddall *v.* Bryan, 14 Md., 444; Haywood *v.* Cope, 25 Beav., 151. See, as to the application of the same doctrine to applications for receivers, Owen *v.* Homan, 3 Mac. & G., 378, affirmed on appeal to the House of Lords, 4 H. L. Rep., 997; Hamburgh Manufacturing Co. *v.* Edsall, 4 Halst. Ch., 141; Pullan *v.* Cincinnati & Chicago R. Co., 4 Bissell, 47; Mays *v.* Rose, Freem. (Miss.), 703; Whelpley *v.* Erie Railway Co., 6 Blatchf., 271.

§ 738. Another point of resemblance between these extraordinary equitable remedies, when invoked *in limine*, is that they are of a provisional or auxiliary nature, and frequently employed merely as an adjunct to the principal relief sought by the action, and not always or necessarily the ultimate or principal object of the action. And the granting of either species of relief, upon an interlocutory application, is not a final determination of any questions of right or title which may be involved in the litigation; and the court, in passing upon the application, in no manner anticipates its ultimate judgment upon the rights of the parties, the fundamental idea upon the preliminary application being only to preserve the fund or property in litigation *in statu quo*, for the benefit of whoever may finally be determined to be entitled thereto. The court, in granting the relief, only recognizes that sufficient cause is presented to warrant its summary interference *in limine*, and until a final hearing on the merits, without expressing, and frequently without having the means of forming, an opinion as to the ultimate rights of the parties.[1] Indeed, upon an interlocutory application for a receiver, if plaintiff shows an apparent title to the thing in controversy, and presents a *prima facie* case, and if the court is satisfied that there is imminent danger of loss unless it shall interpose the aid of a receiver, it may grant the relief without further investigation into the merits.[2] And since the court is bound to express its opinion only so far as to show the grounds upon which it deter-

[1] See this doctrine applied to interlocutory applications for receivers, in Hottenstein *v.* Conrad, 9 Kan., 435; Cooke *v.* Gwyn, 3 Atk., 689; Huguenin *v.* Baseley, 13 Ves., 105; Ellicott *v.* Warford, 4 Md., 80; Blakeney *v.* Dufaur, 15 Beav., 40; Leavitt *v.* Yates, 4 Edw. Ch., 162; Brown *v.* Northrup, 15 Ab. Pr., N. S., 333; *Ex parte* Walker, 25 Ala., 104. The doctrine is very clearly expressed by McCoun, Vice-Chancellor, in Leavitt *v.* Yates, 4 Edw. Ch., 162. For its application to cases of preliminary injunctions, see Great Western R. Co. *v.* Birmingham & Oxford Junction R. Co., 2 Ph., 597.

[2] Leavitt *v.* Yates, 4 Edw. Ch., 162; Brown *v.* Northrup, 15 Ab. Pr., N. S., 333.

mines the application, it will usually confine itself to the point which it is called upon to decide, without going into the merits of the case at large.[1]

§ 739. In instituting a comparison between these principal extraordinary remedies of equity, the most striking point of difference between them is found in their effect or operation upon the possession of the fund or property in litigation. An injunction never operates to change possession; a receiver always and necessarily has this direct and immediate effect. An injunction can not be used to take property out of the custody and control of one party and place it in the possession of another;[2] while in appointing a receiver, a court of equity at once wrests possession from the defendant; assumes and continues by its officer the entire management and control of the property or fund; frequently changes its form, or absolutely disposes of it, and usually retains this exclusive possession until the rights of all persons in interest are finally adjusted. An injunction merely restrains action, and aims at preserving the subject-matter, as well as the attitude of all parties in interest thereto, *in statu quo;* while a receivership changes at once the attitude of all parties toward the subject-matter of the litigation; divests defendant's possession, and interposes the officer of the court as a custodian of the property or fund, for the common benefit of all parties concerned.

§ 740. Under the code of procedure prevailing in New York, the granting of injunctions and the appointment of receivers, *in limine*, are known as provisional remedies, and are treated by the courts of that state as of equal weight and importance. And while the two remedies are frequently administered in one and the same action, the granting of an injunction by a court of competent jurisdiction operates as a bar to the appointment of a receiver, in a subsequent proceeding between the same parties in another

[1] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162.

[2] Murdock's Case, 2 Bland, 461; Bosley *v.* Susquehanna Canal, 3 Bland, 63.

court. The jurisdiction of the court, and its control over all subsequent proceedings, being regarded as attaching upon the service of process, or the allowance of a provisional remedy, when the court first moving has acquired jurisdiction by the granting of an injunction, another court will decline to interfere.[1]

§ 741. From the points of resemblance between these remedies, which have been already indicated, it necessarily follows that certain well-defined and elementary principles by which courts of equity are governed in the exercise of their extraordinary jurisdiction, are equally applicable in determining applications for both species of relief. A controlling principle of this class, and one which is believed to be of general application, is, that the existence of an adequate remedy at law is always a bar to the aid of equity by granting either of the remedies under consideration. Courts of equity will always refuse to lend their aid for the protection of rights, or for the prevention of wrongs, when the ordinary legal remedies are adequate to afford redress; and when it does not appear that the remedy at law is insufficient, or that the party aggrieved is entitled to more speedy relief than can be had by the ordinary and accustomed modes of procedure at law, an injunction will be refused.[2] Legal rights are left to the decision of a legal forum, and in the absence of special circumstances warranting the interposition of the extraordinary aid of courts of equity by an injunction, such courts will not interfere for the protection of a strictly legal right which may be properly tried at law.[3] And upon similar principles, equity refuses to extend the aid of a receiver in all cases where the persons aggrieved may obtain ample redress in the usual course of proceedings at law, or where courts of law afford

[1] McCarthy *v.* Peake, 18 How. Pr., 138; S. C., 9 Ab. Pr., 164.

[2] Coughron *v.* Swift, 18 Ill., 414; Winkler *v.* Winkler, 40 Ill., 179; Poage *v.* Bell, 3 Rand., 586; Webster *v.* Couch, 6 Rand., 519; Akrill *v.* Selden, 1 Barb., 316; Sherman *v.* Clark, 4 Nev., 138; Mullen *v.* Jennings, 1 Stockt., 192; Hart *v.* Marshall, 4 Minn., 294; Wooden *v.* Wooden, 2 Green Ch., 429.

[3] Wooden *v.* Wooden, 2 Green Ch., 429.

a safe and expedient remedy for the particular grievance.[1] And when the person aggrieved has had ample opportunity of asserting his rights in an action at law, but has negligently omitted so to do, he is barred from obtaining relief in equity by an injunction.[2] So, too, when a person having an adequate remedy at law for the redress of a particular grievance, loses that remedy by his own laches, he can not come into a court of equity and obtain a receiver upon the same grounds which should have been asserted in the action at law.[3]

§ 742. It is also to be noticed, that long acquiescence in a particular grievance, without effort to redress it, is generally held to be a complete bar to relief in equity, either by a receiver or an injunction. And plaintiffs, who have quietly acquiesced in defendants' possession of property for a long period of years, without attempting to assert their rights to the property, and who then seek to change such possession by a receiver, will be denied the aid of the court *in limine*.[4] And when the application for a receiver is based upon the alleged misconduct of defendant, but it is shown that the state of affairs complained of has existed for many years, with full knowledge of plaintiffs and without their objection, equity will refuse to lend its aid by a receiver.[5] The same principle prevails in administering relief by interlocutory injunction, and the courts have almost uniformly held that long-continued acquiescence by the plaintiff in any particular grievance or violation of his rights, which he afterward seeks to redress by the preventive aid of an injunction, operates as a bar to relief in equity, and courts of equity will decline to interfere in behalf of persons thus negligent in the assertion of their rights.[6]

[1] Sollory *v.* Leaver, L. R., 9 Eq., 22; Cremen *v.* Hawkes, 2 Jo. & Lat., 674; Parmly *v.* Tenth Ward Bank, 3 Edw. Ch., 395; Corey *v.* Long, 43 How. Pr., 497; S. C., 12 Ab. Pr., N. S., 427.

[2] Tapp *v.* Rankin, 9 Leigh, 478.

[3] Drewry *v.* Barnes, 3 Russ., 94.

[4] Gray *v.* Chaplin, 2 Russ., 126.

[5] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162.

[6] Wood *v.* Sutcliffe, 2 Sim., N. S., 163; Payne *v.* Paddock, Walk. (Mich.), 487; Jacox *v.* Clark, id., 249;

§ 743. From the points of resemblance already indicated between these remedies, and from the application of certain fundamental principles of equity in administering both, it is not to be inferred that the appointment of a receiver necessarily follows the granting of an injunction in all cases, or that an injunction is a necessary incident to a receivership, or that the two remedies are always inseparable. And while there are cases where an injunction follows a receivership almost as of course,[1] or where a receiver is a necessary incident to an injunction;[2] and while it frequently happens that the courts are called upon to administer both remedies in one and the same action and at one and the same time, it by no means follows that the one is a necessary incident of the other, and the two are to be regarded as separate and independent remedies. In other words, while both are branches of the extraordinary preventive jurisdiction of equity, they are yet distinct and separate branches, used for the attainment of different results, and a court of equity may properly refuse a receiver, although an appropriate case is presented for an injunction.[3] So, upon the other hand, it is regarded as proper to appoint a receiver, if the facts showing the necessity for the relief and the proper parties are before the court, although the application was made for an injunction, and did not specify the appointment of a receiver.[4] But if the injunction is a mere adjunct of the receivership, the reversal of the order appointing the receiver will also operate as a reversal of the injunction.[5]

§ 744. Neither of the remedies under consideration is regarded as an appropriate means, nor is a court of equity the proper forum, for determining disputes or controversies concerning the title to public offices, all such questions properly

Powell *v.* Allarton, 4 L. J. Ch., N. S., 91; Maythorne *v.* Palmer, 11 Jur., N. S., 230.

[1] See Seighortner *v.* Weissenborn, 5 C. E. Green, 172.

[2] See Penn *v.* Whiteheads, 12 Grat., 74.

[3] Rawnsley *v.* Trenton Mutual Life & Fire Insurance Co., 1 Stockt., 347; Oakley *v.* Paterson Bank, 1 Green Ch., 173.

[4] Whitney *v.* Buckman, 26 Cal., 447.

[5] Merrell *v.* Pemberton, 62 Ga., 29.

pertaining to courts of law, to be determined by proceedings in *quo warranto*, or other appropriate remedies prescribed by law for that purpose. And while there are cases where both receivers and injunctions have been allowed in aid of litigation to determine the right to the fees or emoluments of public offices, considered merely as property and when only contract rights have been involved,[1] equity will refuse to lend its extraordinary aid, either by an injunction or by a receiver, for determining controversies concerning the title to public offices, and will leave all such questions to the decision of courts of law, to which forum alone they properly pertain.[2]

§ 745. It is not essential to the exercise of either branch of the extraordinary jurisdiction of equity under consideration, that the property constituting the subject-matter of the litigation should be within the jurisdiction of the court, provided the parties are within its control and amenable to its process. And there are frequent cases where injunctions have been granted against parties within the jurisdiction of the court, although the subject-matter in controversy was beyond reach of its process.[3] So there are frequent instances where equity has appointed receivers, although the estate or property which it was sought to protect was beyond the jurisdiction of the court, being situated in a foreign country, the parties in interest, however, being within its control and subject to its process.[4] And it would seem to be competent for a court of equity, in one country, to grant an injunction and appoint a receiver in aid of the

[1] Palmer *v.* Vaughan, 3 Swans., 173; Cheek *v.* Tilley, 31 Ind., 121.

[2] Tappan *v.* Gray, 9 Paige, 507. And see People *v.* Draper, 24 Barb., 265; Stone *v.* Wetmore, 42 Ga., 601.

[3] Bunbury *v.* Bunbury, 1 Beav., 320; Beckford *v.* Kemble, 1 Sim. & Stu., 7. See, also, Cranstown *v.* Johnston, 3 Ves., 182; Portarlington *v.* Soulby, 3 Myl. & K., 104; Dehon *v.* Foster, 4 Allen, 545; Vail *v.* Knapp, 49 Barb., 299; Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792.

[4] Davis *v.* Barrett, 13 L. J., N. S. Ch., 304; Langford *v.* Langford, 5 L. J., N. S. Ch., 60; Sheppard *v.* Oxenford, 1 Kay & J., 491; —— *v.* Lindsey, 15 Ves., 91.

enforcement of a decree rendered in a foreign country.[1] But the exercise of such a power is regarded as improper when it is doubtful, upon the record, whether plaintiffs will be ultimately entitled to a decree in the second action.[2]

§ 746. The existence of a conflict of jurisdiction between state and federal courts has been made the foundation for relief in equity, both by granting an injunction and by appointing a receiver over the property in controversy. Thus, where there were actions pending in both tribunals between adverse claimants to certain property of a perishable nature, and there was a probability of a bitter and long-continued litigation, as well as imminent danger of collision between the executive officers of the two courts in the enforcement of the process of their respective courts, the case was regarded as an appropriate one for an injunction and a receiver, the property being liable to become entirely valueless unless taken possession of and sold.[3]

§ 747. The aid of an injunction is sometimes a necessary adjunct to a receivership for the purpose of protecting the receiver's possession, and to prevent any unauthorized interference, by suit or otherwise, with the property or fund entrusted to his care. Indeed, so jealous are courts of equity of any unauthorized interference with the possession of their receivers, that they usually require all adverse claimants to come in and assert their rights in the action in which the receiver was appointed. And when parties asserting a right to property which is subject to a receivership attempt any unauthorized interference therewith, or institute actions for its recovery against the receiver, without first obtaining leave of the court by which he was appointed, that court may enjoin them from proceeding, and thus compel them to assert their rights in the same forum in which the receiver was appointed.[4] And this may be done, even though

[1] Houlditch *v.* Lord Donegal, 8 Bligh (N. S.), 301.

[2] Houlditch *v.* Lord Donegal, Beat., 146.

[3] Crane *v.* McCoy, 1 Bond C. C., 422.

[4] Tink *v.* Rundle, 10 Beav., 318; Attorney-General *v.* St. Cross Hos-

the claimant has an apparently clear right to the property, since he can not be permitted to disturb the receiver's possession until he has established his right by appropriate proceedings for that purpose.[1] So a receiver's possession may be protected by injunction, although the party enjoined is proceeding in the exercise of a statutory right, as in the case of a railway company attempting to condemn land in accordance with statute for the use of its road, but without obtaining leave of the court by which a receiver had been appointed over the land.[2] So a person asserting a right of common, in real estate in a receiver's possession, has been enjoined from trespassing upon the property when the alleged right of common had been abandoned for several years, although leave was given to be examined before a master, *pro interesse suo*, as to the right claimed.[3] So, too, a receiver who was entitled to possession of and to collect wharfage from a wharf or landing upon a river, connected with the property entrusted to his care, has been allowed to maintain a bill for an injunction against the authorities of a municipal corporation, who were interfering with his possession and attempting to collect the wharfage.[4] And when tenants of premises subject to a receivership have, without leave of court, instituted actions of trespass or of replevin against the receiver, who has distrained for rent due from such tenants, they may be enjoined from proceeding with such actions.[5] It is held, however, that an action against a receiver in his official capacity will not be enjoined, on the receiver's application, upon the ground that the matters in controversy have been determined by the court in other proceedings, since this would be a complete defense to the action which the receiver seeks to enjoin, and he should avail himself of it in that action.[6]

pital, 18 Beav., 601; Johnes *v.* Claughton, Jac., 573; Evelyn *v.* Lewis, 3 Hare, 472.

[1] Evelyn *v.* Lewis, 3 Hare, 472.

[2] Tink *v.* Rundle, 10 Beav., 318.

[3] Johnes *v.* Claughton, Jac., 573.

[4] Grant *v.* City of Davenport, 18 Iowa, 179.

[5] *In re* Persse, 8 Ir. Eq., 111; Parr *v.* Bell, 9 Ir. Eq., 55.

[6] Jay's Case, 6 Ab. Pr., 293.

§ 748. It has been shown in the preceding section, that courts of equity frequently interfere by injunction to prevent the prosecution of unauthorized suits against their receivers, such relief being necessary for the protection of the receiver's possession, which is, in fact, the possession of the court itself. It is also to be observed, that the receiver himself may be enjoined from prosecuting unauthorized suits against third persons, under pretense of authority derived from the court. And when a receiver brings an action in the name of a third person, without his authority and without the sanction of the court, the parties to such suit are entitled to the aid of the court by an injunction to restrain such unauthorized proceedings.[1] If, however, the receiver has been duly authorized by the court to bring a particular action, it will not permit him to be enjoined from proceeding, the proper course for persons who may be dissatisfied being to apply to the court appointing him for relief, instead of seeking to enjoin him in another suit.[2]

[1] *In re* Merritt, 5 Paige, 125.

[2] Winfield *v.* Bacon, 24 Barb., 154.

II. The Remedies as Applied to Corporations.

§ 749. Questions of considerable interest have sometimes arisen as to the extent to which the remedies by injunction and receiver may be applied, in connection with each other, in cases affecting civil corporations and the rights of shareholders and creditors. It frequently happens that the extraordinary aid of equity is invoked against corporate bodies, under circumstances such as to warrant an injunction against the corporation or its officers, while the court is not justified in extending the aid of a receiver. Indeed, the general jurisdiction exercised by courts of equity over corporations, independent of statute, does not extend to the power of dissolving the corporation and destroying its franchise, or of sequestrating the corporate property for the benefit of creditors and shareholders. The tendency of modern legislation, however, has been toward an enlargement of the powers of courts of equity in this regard, and in many of the states the power of appointing receivers over corporations has been expressly conferred by legislative enactment. But, in the absence of statutory authority, the courts frequently decline to assume control by a receiver over the affairs of a corporation, upon a bill by a shareholder alleging fraud and mismanagement on the part of its officers, and limit the relief to the granting of an in-

junction.[1] Even though the jurisdiction of the court, as enlarged by statute, extends to appointing a receiver over a corporation in a proper case, it by no means follows, because an injunction has been granted against the corporation, that a receiver should be allowed; since the circumstances of the case may be such as to justify a suspension of the business of the corporation, while its officers are not in fault and are the most proper persons to wind up its affairs. And if it is apparent to the court that a receiver is not required to protect the interests either of shareholders or of creditors, and that a stranger to the corporate business and affairs can not wind them up as satisfactorily as the directors, a receiver will not be appointed and the management will be left in the hands of the directors.[2]

§ 750. While, as is thus seen, courts of equity are generally more reluctant to interfere with the management of a corporation by a receiver than by an injunction, yet when a receiver has been appointed, an injunction may follow as a necessary adjunct to the relief already granted. And upon appointing a receiver of all the assets and effects of a corporation, in a proceeding to sequestrate its property and wind up its affairs, the court may, in connection with such receivership and as a part of its order, enjoin the officers and directors from disposing of or incumbering any of the property, and from collecting any demands due to the corporation, such an injunction being treated as a necessary adjunct or incident of the receivership.[3] Indeed, the appointment of a receiver over a corporation is frequently equivalent to a suspension of its corporate functions, and to an injunction against its agents and officers, restraining

[1] Waterbury *v.* Merchants Union Express Co., 50 Barb., 157; Neall *v.* Hill, 16 Cal., 145; Howe *v.* Deuel, 43 Barb., 504; Belmont *v.* Erie R. Co., 52 Barb., 637.

[2] Rawnsley *v.* Trenton Mutual Life and Fire Insurance Co., 1 Stockt., 347; Oakley *v.* Paterson Bank, 1 Green Ch., 173; Nichols *v.* Perry Patent Arm Co., 3 Stockt., 126.

[3] Morgan *v.* New York & Albany R. Co., 10 Paige, 290.

them from intermeddling with the property or with its management.[1]

§ 751. Under the code of procedure in New York, in proceedings by the attorney-general of the state in the nature of a *quo warranto*, having for their object the dissolution of a corporation and the forfeiture of its franchises, while the court may properly grant an injunction to restrain the corporation from disposing of its funds, or from doing any illegal act, it will not appoint a receiver before judgment of forfeiture.[2]

§ 752. Under the statutes of some of the states, receivers appointed to wind up the affairs of insolvent corporations are empowered to collect from delinquent shareholders the amounts due for unpaid subscriptions to capital stock. When a receiver, in the discharge of this duty, has obtained a decree against a shareholder for the payment of a balance due on account of his subscription, such shareholder is not entitled to an injunction against the receiver to restrain him from collecting the amount until all the debts can be ascertained, and the amount due from each shareholder be determined, since such objections should have been urged in defense of the action brought by the receiver, and will not avail after a decree in that action.[3] But when a receiver of a corporation, occupying for the purposes of such suit the position of a trustee for all its creditors, institutes an action to recover back from the shareholders illegal dividends, which they have received from the corporation while it was in a state of insolvency, such shareholders are entitled to the protection of an injunction against individual creditors of the corporation, to restrain them from prosecuting like actions.[4] So a receiver of a corporation, who is invested with a right of action against delinquent shareholders for the recovery of their unpaid subscriptions to

[1] Gravenstine's Appeal, 49 Pa. St., 310.

[2] People *v.* Washington Ice Co., 18 Ab. Pr., 382.

[3] Pentz *v.* Hawley, 1 Barb. Ch., 122.

[4] Osgood *v.* Laytin, 3 Keyes, 521, affirming S. C., 48 Barb., 464.

the capital stock, may enjoin the creditors of the company from proceeding with separate actions of the same nature for satisfaction of their individual demands.[1] And when the receiver of an insolvent bank is proceeding in equity concurrently and in the same action with some of its creditors to enforce an additional liability of the stockholders under the charter for the benefit of all creditors entitled thereto, the court may enjoin individual creditors from pursuing separate actions at law to enforce such liability for their own benefit.[2]

§ 753. The aid of an injunction is sometimes necessary in behalf of a receiver, as an adjunct to the original action in which he was appointed, and for the purpose of more effectually preserving the subject-matter over which his appointment extends. For example, when a receiver is appointed over a railway company, and is empowered by the order of court to secure and protect the assets, franchises and rights of the company, and a land grant to which it is entitled from the state, he may maintain a bill in equity to enjoin the state officers from granting the same lands to other persons. Such an action is regarded as an adjunct of the original suit, and is analogous to a petition by the receiver to the court, asking that it protect his possession and the property under his control.[3] So when a receiver is appointed over a railway company in behalf of its mortgage bondholders, in proceedings for foreclosure when the security is inadequate to the payment of the mortgage indebtedness and the corporation is shown to be insolvent, it is proper to accompany the receivership with an injunction against the railway company and its agents, to prevent any interference with the receiver, or with the property entrusted to him.[4] And as between different mortgagees of the tolls of

[1] Calkins *v.* Atkinson, 2 Lans., 12; Rankine *v.* Elliott, 16 N. Y., 377.

[2] Eames *v.* Doris, 102 Ill., 350.

[3] Davis *v.* Gray, 16 Wal., 203, affirming S. C., 1 Woods, 420.

[4] Ruggles *v.* Southern Minnesota Railroad, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110.

a turnpike company, all of whom are entitled to payment out of the tolls *pari passu*, and without priority, a mortgagee who receives the entire tolls, and applies them in discharge of his own demand, may be enjoined and a receiver of the tolls may be appointed on the application of another mortgagee.[1]

§ 754. A receiver of a railway company, who is directed to operate and manage the road subject to the orders and direction of the court, is entitled to an injunction to prevent an improper diversion of the earnings or an attempt to divest the receiver's control over them, since his successful management of the road depends upon his control over its income and earnings. And the injunction may be granted, although the attempt to divert the earnings is made by suit in another state, the parties, however, being within the jurisdiction of the court by which the receiver was appointed, and whose aid he seeks by injunction. The court, under such circumstances, does not attempt by its injunction to operate upon the court in the other state, but only acts *in personam* upon the parties within its own jurisdiction, in accordance with well-established principles of equity, and restrains them from interfering with or diverting the earnings to which the receiver is entitled.[2]

[1] Dumville *v.* Ashbrooke, 3 Russ., 99, note c.

[2] Vermont & Canada R. Co. *v.* Vermont Central R. Co., 46 Vt., 792.

III. Creditors' Suits.

§ 755. Courts of equity are frequently called upon to interfere, both by a receiver and an injunction, for the protection of judgment creditors seeking the enforcement of their judgments out of the property and equitable assets of the debtor. Neither remedy, however, will be administered in behalf of mere general creditors, without lien upon the debtor's property, and whose rights have not been judicially established by a judgment. Any interference with the property of the citizen, or with his right to manage and dispose of it, before judgment recovered against him, is beyond the judicial power, and courts of equity will not enlarge or extend their extraordinary jurisdiction beyond the well-defined limits fixed by law. And whatever hardships or embarrassments may result to creditors from the enforcement of the doctrine, by reason of the slow procedure in courts of law or otherwise, are regarded as evils which should properly be redressed by legislative rather than by judicial authority.[1] And the rule is applied even where the bill alleges gross fraud upon the part of the debtor, and that he

[1] Uhl *v.* Dillon, 10 Md., 500; Blondheim *v.* Moore, 11 Md., 365; Nusbaum *v.* Stein, 12 Md., 315; Hubbard *v.* Hubbard, 14 Md., 356; Bayaud *v.* Fellows, 28 Barb., 451; Wiggins *v.* Armstrong, 2 Johns. Ch., 144; Holdrege *v.* Gwynne, 3 C. E. Green, 26; Young *v.* Frier, 1 Stockt., 465; Phelps *v.* Foster, 18 Ill., 309; Bigelow *v.* Andress, 31 Ill., 322. See, *contra*, Haggarty *v.* Pittman, 1 Paige, 298; Cohen *v.* Meyers, 42 Ga., 46; Thompsen *v.* Diffenderfer, 1 Md. Ch., 489; Rosenberg *v.* Moore, 11 Md., 376.

has transferred his effects to defraud his creditors, and that plaintiff has brought suit upon his demand, but can not obtain judgment and execution before defendant's assets are wasted.[1]

§ 756. Under the New York code of procedure, however, a departure from the rule is allowed in proceedings for the enforcement of demands due from partnership debtors. And it is held, in such cases, when the insolvency of the firm and of its individual members is conceded, and the indebtedness is admitted to be justly due, that a creditor of the firm, even before judgment, may have an injunction and a receiver, as against the partners and third persons to whom they have attempted to assign their property for the purpose of hindering their creditors. In such cases, there being no advantage to be derived from a preliminary judgment and execution, the courts extend all the relief sought in one and the same action, without compelling the creditor to submit to the delay of obtaining judgment by a separate suit.[2]

§ 757. So a creditor may have such a special or equitable lien upon the debtor's property as to entitle him both to a receiver and an injunction, although his demand is not yet reduced to judgment. Thus, persons advancing money for supplies and repairs of a vessel, and receiving from the master an assignment of all the earnings of the vessel upon her voyage, and of all lien or interest which he as master has therein, are entitled to an injunction against any interference with the collection of the earnings, as well as a receiver to collect them, upon showing the insolvency of the owners and that such relief is necessary to protect their lien.[3] So in an equitable action by creditors of a married woman who is doing business as a trader, the creditors seeking to charge her individual property with the payment of her debts, it

[1] Rich *v.* Levy, 16 Md., 74.

[2] Mott *v.* Dunn, 10 How. Pr., 225. And see Levy *v.* Ely, 15 How. Pr., 395; La Cliaise *v.* Lord, 10 How. Pr., 461; Jackson *v.* Sheldon, 9 Ab. Pr., 127.

[3] Sorley *v.* Brewer, 18 How. Pr., 276.

has been held proper to appoint a receiver and grant an injunction, when it is apparent that there is danger of the assets being wasted or placed beyond reach of the creditors, the relief, in such a case, being based upon the same grounds as in ordinary cases of creditors' bills for the enforcement of judgments.[1]

§ 758. After creditors have established their demands against a debtor by judgment, and have thus acquired a lien upon his property, they may properly invoke the aid of equity both by a receiver and an injunction, as a necessary means of enforcing payment of their judgments, and preventing the debtor from wasting or disposing of his assets until their judgments are satisfied. For example, creditors who have obtained judgment and levied upon a stock of goods in their debtor's possession may have an injunction and a receiver, as against the debtor and a third person claiming the goods as mortgagee, upon a bill alleging that the goods are more than sufficient to pay the mortgage indebtedness; that a portion of the stock is not covered by the mortgage; that the debtor has no other property out of which to satisfy the judgment, and that the mortgagee has permitted the debtor to use and dispose of the goods covered by the mortgage.[2] And under the former chancery practice in New York, receivers and injunctions were allowed almost as of course upon creditors' bills, after return of execution against the debtor *nulla bona*. And it was held to be the duty of the judgment creditor, after filing his bill and obtaining an injunction to restrain the debtor from interfering with his assets, to apply to the court within a reasonable time for a receiver over the assets, to prevent them from being wasted or destroyed, and to secure the collection of debts due the defendant.[3] In such cases, the courts proceed upon the theory that the defendant debtor, after being enjoined from interfering with or disposing of his property,

[1] Todd *v.* Lee, 15 Wis., 365.

[2] Rose *v.* Bevan, 10 Md., 466.

[3] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 214; Osborn *v.* Heyer, 2 Paige, 342. And see Bloodgood *v.* Clark, 4 Paige, 574.

can have no honest motive in resisting the appointment of a receiver; and that if he has property it is for his own interest that it should be preserved *pendente lite*, while if he has none, no harm can result from the appointment, and plaintiff proceeds at the risk of his costs.[1]

§ 759. When a receiver in a creditor's suit institutes an action to recover property transferred by the debtor, under a voluntary assignment for the benefit of his creditors, he is not entitled to an injunction and a receiver as to the property assigned, if he fails to show that the transfer was made to hinder or defraud creditors.[2]

[1] Fitzburgh *v.* Everingham, 6 Paige, 29.

[2] Bostwick *v.* Elton, 25 How. Pr., 362.

IV. Partnerships.

§ 760. In actions for the dissolution of partnerships and for an accounting between partners, courts of equity are frequently called upon to administer relief both by granting an injunction and appointing a receiver, in one and the same action. Substantially the same conditions are necessary, in this class of cases, to justify the interposition of a receiver, as are requisite to warrant an injunction. The relief will not be granted merely because of a quarrel between partners, but there must be some actual abuse of partnership property, or of the rights of a member of the firm, and a mere temptation to such abuse will not suffice. And to warrant a court in granting either of these remedies, the case as presented must appear to be such as to justify a decree for a dissolution of the firm, since, in interposing its extraordinary aid, equity generally looks to the winding up

of the business, and not to its continuation or management by the court. If, therefore, a dissolution has actually taken place, or if it is apparent that it will be decreed because of a breach of contract or of duty by one partner, equity may properly interfere.[1] And when, upon the dissolution of a partnership, the parties are unable to agree upon the adjustment of its affairs, the courts will usually appoint a receiver, with a view to protecting the rights of all parties in interest, and will grant an injunction as a necessary adjunct of the receivership.[2] But when the allegations of the bill on which a preliminary injunction has been granted are fully and positively denied by the answer of the defendant partner, the injunction will be dissolved and a motion for a receiver will be denied.[3]

§ 761. It is also to be borne in mind, that it is indispensable to the granting either of an injunction or of a receiver in partnership cases, that there should actually be an existing partnership between the parties, since, otherwise, the individual property of a defendant might be interfered with, and it might appear in the end that plaintiff had no right. Where, therefore, the partnership is merely nominal, the parties acting under an agreement that one shall be employed by the other, his compensation to be paid by a share of profits either with or without additional salary, the contract expressly stating that they are not partners, although using a firm name, the person thus employed has no such lien upon the assets as to warrant a court of equity in entertaining a bill in his behalf for an injunction and a receiver,[4] even though the conduct of the parties has been such as to render them liable as partners to third persons, the rights of third persons or of creditors not being involved in the litigation.[5] And when the plaintiff partner, in an action

[1] Henn *v.* Walsh, 2 Edw. Ch., 129.

[2] Van Rensselaer *v.* Emery, 9 How. Pr., 135.

[3] Rhodes *v.* Lee, 32 Ga., 470; Henn *v.* Walsh, 2 Edw. Ch., 129.

[4] Kerr *v.* Potter, 6 Gill, 404; Nutting *v.* Colt, 3 Halst. Ch., 539.

[5] Kerr *v.* Potter, 6 Gill, 604.

for the dissolution of a firm, has obtained a receiver and an injunction, but defendants deny the existence of a partnership, and it is apparent to the court that plaintiff's interest in the firm, if any, is very small, and that the business will be greatly endangered, if not ruined, by continuing the receiver, it is proper to permit defendants, in lieu of the injunction and receiver, to give plaintiff security for any sum to which he may ultimately be found entitled.[1]

§ 762. It has already been shown that equity will not extend the aid of an injunction and a receiver in partnership cases because of a mere quarrel between the partners, but that some actual abuse or injury must be shown.[2] But the fact that a partner's conduct has been such as to destroy that feeling of mutual confidence which should exist between copartners may properly be taken into consideration by the court, and is an important element in determining whether plaintiff is entitled to an injunction and a receiver.[3] And when, by reason of the improper conduct of one of two partners, such a want of confidence exists between them as to justify the court in dissolving the firm, a receiver may be appointed and an injunction granted, the injunction following the receiver almost as of course, under such circumstances.[4] And when the case, as presented upon the pleadings, discloses a serious and apparently irreconcilable disagreement between the partners as regards the control and disposition of their assets, and their respective claims against each other, a court of equity may properly grant an injunction and a receiver, the relief, in such a case, being regarded as a provident exercise of the extraordinary jurisdiction of equity.[5] So when plaintiff shows that the defendant partner is insolvent and has disposed of part of the

[1] Popper *v.* Scheider, 7 Ab. Pr., N. S., 56.

[2] See § 760, *ante.*

[3] Smith *v.* Jeyes, 4 Beav., 503. See, also, Sutro *v.* Wagner, 8 C. E. Green, 388; Williamson *v.* Wilson, 1 Bland, 418; Boyce *v.* Burchard, 21 Ga., 74.

[4] Sieghortner *v.* Weissenborn, 5 C. E. Green, 172.

[5] Whitman *v.* Robinson, 21 Md., 30.

property with intent to defraud creditors, an injunction and a receiver may be allowed, although there is a dispute as to whether property in defendant's possession is firm property, if it appears that it was received as part payment upon a sale of property belonging to the firm.[1] So, too, a failure by one partner to contribute his portion of the capital stock as agreed upon by the partnership articles, coupled with his insolvency and refusal to pay any portion of the firm debts, and the sale of his interest to a third person without the knowledge or consent of his partner, afford sufficient grounds for an injunction and a receiver, when such purchaser has taken possession of the firm property and threatens to exclude the other partner therefrom.[2]

§ 763. As has already been shown, equity will seldom lend its aid by a receiver and an injunction in partnership matters, unless such a case is presented as to justify a dissolution of the firm. But it is not to be inferred from this general doctrine, that, because a firm has been dissolved and plaintiff is entitled to an accounting, he is necessarily entitled to an injunction and a receiver; and there must, in all cases, be some actual abuse of partnership rights, or of partnership property, to warrant a court of equity in interfering.[3] Where, however, in an action between partners for a settlement of their firm affairs after dissolution, defendant is shown to be insolvent, the court may properly grant an injunction and a receiver for the protection of plaintiff's rights, the insecurity of the partnership assets, if left to the control of an insolvent defendant, affording strong ground for relief in equity.[4]

§ 764. Violations of the copartnership articles are sometimes made the foundation for an injunction and a receiver in controversies between partners. Thus, when a partnership is formed for the purpose of sawing lumber, and by the articles of agreement the partner entrusted with the

[1] Saylor *v.* Mockbie, 9 Iowa, 209.

[2] Heathcot *v.* Ravenscroft, 2 Halst. Ch., 113.

[3] Renton *v.* Chaplain, 1 Stockt., 62.

[4] Randall *v.* Morrell, 2 C. E. Green, 343.

management of the business is to take the necessary timber for use in the business from land belonging to his copartner, a violation of this part of the contract has been held to constitute sufficient ground for a receiver and an injunction, the firm being shown to be in a declining condition and its indebtedness increasing.[1] But when an injunction has already been granted in a controversy between partners, which affords ample protection from loss until a motion for a receiver can be regularly heard, the court will decline to appoint a receiver without notice to defendant and before service of process.[2]

§ 765. Where plaintiffs, who were the owners of a farm, had entered into an agreement with defendant in the nature of a partnership for working the farm and for a division of the profits, plaintiffs reserving the right to terminate the partnership on six months notice if the profits should not reach a specified amount, they were allowed an injunction and a receiver, upon showing that the profits had not reached the prescribed amount.[3] And when an association in the nature of a partnership was organized in England, to conduct the business of mining in a foreign country, and the property of the association in the foreign country was vested in a trustee for management, a member of the association in England, upon a bill in behalf of himself and all others for an accounting and a distribution of the profits, was allowed a receiver and an injunction to restrain the trustee from selling, the trustee having absconded and having threatened to sell the property.[4]

§ 766. Although a preliminary injunction is granted upon an *ex parte* application, on a bill by one partner seeking a dissolution of the firm, it does not necessarily follow that a receiver must be appointed. And if the court is satisfied, upon the case as presented, that plaintiff is not entitled to a dissolution, it will refuse to appoint a receiver and will leave

[1] New *v.* Wright, 44 Miss., 202.

[2] McCarthy *v.* Peake, 18 How. Pr., 138.

[3] Dunn *v.* McNaught, 38 Ga., 179.

[4] Sheppard *v.* Oxenford, 1 Kay & J., 491.

the injunction to be dissolved upon motion for that purpose.[1] But the continuance of an injunction which has been granted to preserve partnership property from waste pending an application for the appointment of a receiver, is dependent upon the fate of such application, and if the receiver is denied the injunction must be dissolved.[2] If, however, the court has appointed a receiver, and has also allowed an injunction as a necessary adjunct to the receivership, under the circumstances of the case, upon overruling a motion to rescind the appointment of the receiver it will continue the injunction until the hearing, or until the further order of the court.[3]

§ 767. A full denial by defendant's answer of all the equities of plaintiff's bill will usually operate as a bar to relief by an injunction and a receiver, in partnership as in other cases. And when the plaintiff partner seeks a dissolution, upon the ground that defendant has drawn from the business more than the sum to which he was entitled under the partnership articles, but the answer denies this and denies all the allegations of the bill, the court will not grant either an injunction or a receiver.[4]

§ 768. When a partnership is dissolvable at the will of either partner, and does, in fact, become dissolved by the insolvency of some members of the firm, an assignment of the firm assets by the insolvent members for the payment of their private debts, is sufficient ground for a receiver and an injunction, which should extend to all the firm assets in the hands of the defendants and of their assignee.[5]

§ 769. In case of the death of one partner, there being no partnership articles, and no provision for continuing the business by the representatives of the deceased partner, if the survivor refuses to close up the business within a rea-

[1] Garretson v. Weaver, 3 Edw. Ch., 385.

[2] Walker v. House, 4 Md. Ch., 39.

[3] Williamson v. Wilson, 1 Bland, 428.

[4] Henn v. Walsh, 2 Edw. Ch., 129.

[5] Davis v. Grove, 2 Rob. (N. Y.), 134; Same v. Same, id., 635.

sonable time, but continues to manage it for his own benefit and in his own name, the court will enjoin him from continuing and will appoint a receiver, upon a bill by the administrator of the deceased partner, equity, under such circumstances, regarding the survivor as a trustee for the creditors and representatives of the deceased.[1] And upon appointing a receiver, upon a bill by the administrator of a deceased partner against the survivors, the court will require them to deliver to the receiver all unexpended money in their hands, with all personal property, evidences of debt, and choses in action, and will enjoin them from collecting any debts due to the firm.[2]

§ 770. Upon a bill by a partner for a dissolution of the firm, when the defendant partners have been enjoined from collecting debts, the court should appoint a receiver to collect the debts.[3] And when a receiver is appointed over partnership effects, in proceedings under judgments against the firm, it is improper to enjoin him from the management of the fund or property, since this would be equivalent to enjoining the court itself from disposing of the funds which may come into the hands of its officer, the receiver.[4]

§ 771. When the business of a partnership is of such a nature that it is impossible for a receiver to conduct it, and the court, therefore, directs a sale of the lease and good-will of the firm, it is proper, for the purpose of giving efficacy to the sale of the good-will, to permit either party to purchase, and to enjoin the others from conducting the same business in the same locality.[5]

[1] Holden's Adm'rs *v.* McMakin, Par. Eq. Cas., 270.

[2] Miller *v.* Jones, 39 Ill., 54.

[3] Maher *v.* Bull, 44 Ill., 97.

[4] Van Rensselaer *v.* Emery, 9 How. Pr., 135.

[5] Williams *v.* Wilson, 4 Sandf. Ch., 379.

V. Real Property.

§ 772. In considering the application of the extraordinary remedies under consideration in cases affecting real property, the most noticeable feature to be observed is the extreme aversion manifested by courts of equity to any interference *in limine* with the possession of real estate, as against a defendant in possession and claiming under a legal title. Indeed, it may be asserted as a general proposition, sustained by both the English and American authorities, that in a controversy concerning the title to real property, in which plaintiff asserts a legal title in himself, against a defendant who is in possession under claim of legal title, and in receipt of the rents, courts of equity decline to lend their extraordinary aid either by a receiver or by an injunction *in limine*, and leave the rights of the parties to be determined by a court of law. And while there may be special circumstances of fraud or imminent danger, sufficient in extreme cases to warrant a departure from the rule, the general doctrine as here stated remains unquestioned, and equity will decline to interfere by the exercise of either branch of its extraordinary jurisdiction, before plaintiff has established

his title at law.[1] Indeed, the rule as stated necessarily follows from the established doctrine that equity will not interfere when adequate relief may be had at law. Hence courts of equity will refuse to grant an injunction and appoint a receiver, in a contest concerning the possession of real property, when redress may be had at law by the usual methods of procedure, and will leave the parties aggrieved to pursue their legal remedy. For example, a devisee of realty, claiming by his bill the title and right of possession, and that defendant has unlawfully usurped possession and continues to hold without right, receiving income and depriving plaintiff of his means of support, can not have the aid of an injunction and a receiver *in limine*, even though he alleges the insolvency of defendant in possession, but will be left to assert his title by proceedings at law.[2]

§ 773. It may also be a sufficient objection to disturbing the possession of real property by an injunction and a receiver, that such possession has been long acquiesced in and has remained undisturbed for many years. And when the property in controversy has been held and managed and its proceeds have been applied by a corporation in a particular manner and for a long term of years, the possession will not be disturbed by an injunction and a receiver upon the ground that such application of the proceeds is a breach of trust, unless the court is satisfied that defendant is a mere naked trustee, without right or discretion as to the management of the property.[3]

§ 774. The general rule already stated, denying the aid of a receiver and an injunction as against a defendant in possession under claim of title, is applicable as between a

[1] Lloyd *v.* Passingham, 16 Ves., 59; S. C., 3 Meriv., 697; Schlecht's Appeal, 60 Pa. St., 172; Pfeltz *v.* Pfeltz, 14 Md., 376. See, also, Clark *v.* Ridgely, 1 Md. Ch., 70; Willis *v.* Corlies, 2 Edw. Ch., 281; Owen *v.* Homan, 3 Mac. & G., 378, affirmed on appeal to the House of Lords, 4 H. L. Rep., 997.

[2] Pfeltz *v.* Pfeltz, 14 Md., 376.

[3] Skinners Company *v.* Irish Society, 1 Myl. & Cr., 162. See, also, Municipal Commissioners of Carrickfergus *v.* Lockhart, Ir. Rep., 3 Eq., 515.

lessor and his lessee, the latter being clothed with a legal title and a right to possession thereunder. And when the owner of premises executes a lease thereof, under which the lessee is authorized to bore for and take oil from the premises, returning one-fourth of the product as rental, equity will refuse an injunction and a receiver in a proceeding by the lessor in aid of an action at law for a forfeiture of the lease.[1]

§ 775. When an heir-at-law and devisee under a will files a bill to determine the widow's dower in the estate, and prays an injunction to prevent a transfer of the property and a receiver of the rents and profits, the court will not interfere merely upon an allegation that the rents are in jeopardy, but it must appear how they are endangered. And when the bill does not allege that the rents and profits will be lost by reason of insolvency of the persons who are receiving them, or that plaintiff has not an adequate remedy at law for whatever portion of the rents he may be entitled to, the relief will be refused.[2]

§ 776. A purchaser of lands at a judicial sale, who has obtained a sheriff's deed of the premises upon the expiration of the statutory period of redemption, has been allowed a receiver and an injunction in aid of an action to obtain possession. And when, in such an action, it was alleged that defendants were insolvent and were endeavoring to defraud plaintiff of his rights, the court granted an injunction and appointed a receiver to take charge of the growing crops, in order that they might be harvested and prepared for market, and the proceeds held subject to the final order of the court.[3]

§ 777. A receiver may be allowed the aid of an injunction, in a proper case, to restrain the commission of waste on premises subject to his control. And it is held under the

[1] Chicago & Allegheny Oil & Mining Co. *v.* The United States Petroleum Co., 57 Pa. St., 83; S. C., 6 Phila., 521.

[2] Knighton *v.* Young, 22 Md., 359.

[3] Corcoran *v.* Doll, 35 Cal., 476.

Irish practice, that the receiver may, in a pressing case, file his bill to enjoin the waste, and that at the same time with moving for the injunction he may move a reference to a master, to report as to the necessity of such proceeding and whether it shall be continued.[1] So it has been held proper for the court, upon motion of the receiver, to grant a conditional restraining order against the commission of waste by tenants, without any bill being filed for that purpose, leaving the question to be determined by the court when cause is shown against the restraining order.[2] So when premises subject to a receivership are held by tenants under a lease, with a covenant against using the premises for a particular purpose, as for a shop, on pain of forfeiture in case of a breach of the covenant, the receiver may have the aid of an injunction to restrain a tenant from using the premises for the purpose prohibited by the covenant.[3]

§ 778. In an equitable action for the recovery of real property, upon the ground that the proceedings by which plaintiff's ancestor had been divested were void by reason of fraud and mistake, and also for want of jurisdiction in the court in which such proceedings were had, it is proper to allow a receiver and an injunction, when it appears that defendants in possession and collecting the rents are irresponsible, and that the premises are in a ruinous condition and will continue to deteriorate if left in defendant's possession during the litigation.[4] And on a bill against tenant for life, seeking an injunction to restrain him from disposing of the property, if the tenant for life in possession has permitted the taxes to be in arrears, the court may appoint a temporary receiver of as much of the rents and income as will suffice to pay the taxes due and in arrear, unless defendant shall pay them within a specified time.[5] But a mere

[1] Mangle *v.* Lord Fingall, 1 Hog., 142.

[2] Cronin *v.* McCarthy, Flan. & K., 49.

[3] Mason *v.* Mason, Flan. & K., 429.

[4] Rogers *v.* Marshall, 6 Ab. Pr., N. S., 457.

[5] Cairns *v.* Chabert, 3 Edw. Ch., 312.

contract between the owner of land and a tenant, providing for the working of the land by the tenant for a given time, the owner to receive compensation out of the crops grown thereon, does not entitle the owner to an injunction to restrain the tenant from removing the crops, or to a receiver to manage the land and take possession of the ungathered crop.[1]

§ 779. When property has been placed in the hands of a receiver, a remainder-man and tenants of the premises have been refused an injunction to restrain the receiver from turning them out of possession, the court holding that their interest was insufficient to sustain such an application.[2]

§ 780. While courts of equity are usually averse to the exercise of their extraordinary jurisdiction as against tenants in common of realty, there are cases where the relief is proper upon the ground of exclusion of his co-tenant by a tenant in possession, who is in insolvent circumstances.[3] And a plaintiff, claiming a moiety of an estate as tenant in common with defendant who was in possession of the whole, has been allowed a receiver of the rents and profits of such moiety, and an injunction to restrain defendant from collecting the rents thereof.[4]

[1] Williams *v.* Green, 37 Ga., 37.

[2] Wynne *v.* Lord Newborough, 1 Ves. Jun., 164.

[3] See Williams *v.* Jenkins, 11 Ga., 595; Street *v.* Anderton, 4 Bro. C. C., 414; Sandford *v.* Ballard, 30 Beav., 109.

[4] Hargrave *v.* Hargrave, 9 Beav., 549.

CHAPTER XVIII.

OF THE RECEIVER'S COMPENSATION.

§ 781. Compensation regulated by court in the absence of legislation.
782. English practice; no settled rule; reference to master to determine.
783. No fixed rule in this country; compensation dependent upon circumstances of case.
784. The rule in Massachusetts; reasonable pay for person of ordinary ability allowed; rule in Maryland.
785. Receivers sometimes allowed same rates as guardians, executors or administrators; commissions on receipts and disbursements; New York doctrine.
786. Receivers in lieu of executors allowed same compensation.
787. Receiver over railway allowed more liberal compensation than in ordinary cases.
788. Entitled to compensation for work performed by others; farms managed by overseers; commission on receipts and disbursements.
789. When receiver allowed to make rests.
790. When refused extra compensation for journeys to foreign country to conduct litigation.
791. When receiver of insurance company allowed commissions on premium notes surrendered.
792. Payment into court to avoid receiver's compensation.
793. Receiver over minor denied extra compensation for attending survey of estate.
794. Doctrine of the Irish Chancery; receiver appointed by consent.
795. Partner appointed receiver not allowed compensation.
796. Receiver can not have judgment against the parties on motion; practice in fixing compensation; part of compensation taxed as costs against plaintiff; chargeable on fund; appeal.

§ 781. The power of courts of equity to fix the compensation of their own receivers is well established, and results necessarily from the relation which the receiver sustains to the court, he being its officer or agent, deriving his functions only from that source. In the absence, therefore, of

any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment.[1] And in passing upon the compensation of a receiver, an appellate court will ordinarily defer much to the judgment of the court below by which the receiver was appointed, that court having had the supervision of his conduct.[2]

§ 782. Under the practice of the English Court of Chancery, there seems to have been no settled or established rule as to the amount of compensation to be allowed receivers for their services. In an early case in that court, it was ordered by the terms of the decree appointing the receiver, that he should be allowed a reasonable salary for his care and trouble in the management of the estate, such salary to be determined by the master in chancery.[3] And the usual practice seems to have been to leave the matter to the determination of a master, and these officers were governed in their allowance by the degree of difficulty or labor

[1] Gardiner *v.* Tyler, 3 Keyes, 505; S. C., 2 Ab. Ct. Ap. Dec., 247; Baldwin *v.* Eazler, 34 N. Y. Supr. Ct. R., 275; Magee *v.* Cowperthwaite, 10 Ala., 966; Stretch *v.* Gowdey, 3 Tenn. Ch., 565. As to the allowance to a receiver of an insolvent bank for his own compensation, for clerk hire, expenses of receivership and on account of moneys collected and misappropriated by an attorney, see Union Bank Case, 37 N. J. Eq., 420, affirmed on appeal *sub nom.* Sandford *v.* Clarke, 38 N. J. Eq., 265. As to the commissions allowed to receivers of insolvent life and fire insurance companies under the laws of New York, the basis upon which such commissions are computed, and the liability of such receivers to payment of interest upon their balances, see Attorney-General *v.* North America Life Insurance Co., 26 Hun, 294. See, also, Attorney-General *v.* Continental Life Insurance Co., 27 Hun, 524; *In re* Security Life Insurance & Annuity Co., 31 Hun, 36; *In re* Commonwealth Fire Insurance Co., 32 Hun, 78.

[2] Morgan *v.* Hardee, 71 Ga., 736; Hinckley *v.* Railroad Co., 100 U. S., 153.

[3] Carlisle *v.* Berkley, Amb., 599; Special Bank Commissioners *v.* Franklin Institution, 11 R. I., 557. And when a receiver was appointed for the management of real estate, and to collect the rents during the minority of an infant tenant for life, and the rental was stated to be about £2,000 per year, the receiver's compensation was fixed by the court at a salary of £60 per year. Newport *v.* Bury, 23 Beav., 30.

involved in the case, increasing the compensation when there was extraordinary difficulty in collecting the funds, or diminishing it if there was any extraordinary facility in their collection.[1]

§ 783. In this country, as in England, no established rule has been fixed for determining the amount of compensation

[1] Day *v.* Croft, 2 Beav., 488. The considerations involved in determining the amount of compensation to be allowed receivers, under the English practice, are very clearly stated in this case by Lord Langdale, Master of the Rolls, as follows, p. 491: "Various representations having been made at the bar, as to the principle and the practice adopted in the offices of the different masters in respect of receiver's allowances, I thought it right, before disposing of the case, to inquire of the masters what were the principles upon which they acted, and the practice adopted on this point in their several offices. The masters have each of them been good enough to furnish me with a certificate, and I find that there is no general rule, which universally prevails, as to the allowance of a receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small, or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the masters has certified to me a case, where, after consideration, he allowed only 4*l.* per cent. for the receipts of rents and profits of freehold and leasehold estates. Another master has certified to me a case in which the sum paid to the receiver amounted to 300*l.* a year for the first year; the receiver was afterward allowed 150*l.* only for a succession of years, which was afterward reduced to 50*l.* a year, for the receipt of the same rents. It can not, therefore, be considered as an universal or general rule, that 5*l.* per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection. With respect to other receipts, each master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed two and one-fourth per cent., but for gross sums of money this has been very much reduced, and one and one-fourth per cent. has been allowed upon many occasions. It appears, therefore, that the masters, as they ought, consider upon each occasion, what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver."

to be allowed receivers, and it is from the nature of the case quite impracticable to establish an inflexible rule. The compensation is, therefore, usually determined according to the circumstances of the particular case, rather than by any fixed principles or established rate of percentage.[1] It may be said in general terms, that a receiver's compensation should correspond with the degree of business capacity, integrity and responsibility required in the management of the affairs entrusted to him, and that a reasonable and fair compensation should be allowed according to the circumstances of each particular case.[2] And when a statute under which a receiver is appointed authorizes the payment of a reasonable compensation, it is held that such compensation can be best determined, not by a percentage upon his receipts, but by considering the responsibility assumed, the skill and labor expended, and the amounts usually paid for similar services. It is also proper to allow the receiver compensation from

[1] Abbott *v.* Baltimore & Rappahannock Steam Packet Co., 4 Md. Ch., 310. And see French *v.* Gifford, 31 Iowa, 428; Cowdrey *v.* The Railroad Co., 1 Woods, 331.

[2] French *v.* Gifford, 31 Iowa, 428; Jones *v.* Keen, 115 Mass., 170. In French *v.* Gifford, 31 Iowa, 428, the case came up on exceptions to the report of a referee fixing the amount of compensation to be allowed the receiver of a banking institution. Mr. Justice Miller, delivering the opinion, says: "While we concede that the receiver should receive a compensation corresponding to the high degree of business capacity, integrity, and responsibility required in cases of this character, and which was secured in the person of the receiver in this case, yet we feel it our duty to allow only such sum as will be such reasonable compensation. There can be no reasonable grounds to doubt that the receiver in this case, or some other person possessing equal qualifications, could have been employed by private contract to perform the services rendered in this case for half the amount allowed by the referee. This, it seems to us, is the fair and reasonable test by which the amount of compensation to be allowed should be determined. While it may be true that an individual of the required qualifications, if engaged in a lucrative private business, could not be induced to abandon such business for a temporary appointment of this character without extraordinary compensation, yet one of wealth and leisure may readily be found (as in this case), who would undertake the trust for a reasonable and ordinary compensation. We would not be warranted in allowing extraordinary compensation, unless in a case of imperative necessity."

time to time before the close of his receivership, without requiring him to wait until its determination. But the allowance for one years services is not necessarily a precedent for a subsequent year, and in proportion as his responsibility is lightened and the degree of skill and labor required of him is diminished, should his compensation be decreased.[1] Upon the other hand, although his compensation may have been fixed by a salary, yet if the receiver's duties prove to be more arduous and onerous than originally expected either by the receiver or by the court, it is proper to grant him an allowance in addition to his salary.[2]

§ 784. It is held in Massachusetts, that the governing principle in fixing the compensation to be allowed receivers for services rendered by them in the management of their trust is to allow them such a sum as would be a reasonable compensation for the services of a person of ordinary ability, and competent to perform the duties of the receivership. And in fixing this amount the court is not governed by the special qualifications and standing of the person who may be appointed, but will only allow what would be a reasonable amount for a person of ordinary ability performing the work, and this amount will not be fixed upon the basis of a percentage or fixed commission on the amount of funds collected by the receiver.[3] And

[1] Special Bank Commissioners *v.* Franklin Institution, 11 R. I., 557.

[2] Farmers Loan & Trust Co. *v.* Central Railroad, 8 Fed. Rep., 60.

[3] Grant *v.* Bryant, 101 Mass., 567. See, also, Jones *v.* Keen, 115 Mass., 170. Grant *v.* Bryant, 101 Mass., 567, was the case of a receiver upon a bill in equity to wind up a partnership which had been dissolved. The receiver, in submitting his accounts, charged as compensation for his services a commission of two and a half per cent. on the gross amount of assets coming into his hands by the sale of stock, collections of notes and accounts, and otherwise. In support of this charge evidence was introduced as to the usual rates of charge upon commercial transactions by commission merchants and others, and as to the experience, capacity and mercantile standing of the receiver. The court held that the compensation should be limited to a reasonable amount for the services required and rendered by a person of ordinary standing and ability competent for such duties, and that it should not be based upon the usages or rates of profit in any

when a master in chancery, to whom the receiver's accounts have been referred, has fixed the amount to be allowed the receiver for his own compensation, as well as for counsel fees, and the evidence is not preserved, the court will not pass upon the question upon exceptions to the master's report.[1] But in Maryland, it is regarded as proper to allow the same rates of compensation which are fixed by rule of court on sales made by trustees, under decrees and orders of the court.[2]

§ 785. In some instances, the courts have seen fit to fix the compensation of receivers by analogy to the cases of guardians, executors, or other persons occupying fiduciary relations. Thus, in Alabama, it has been held to be the more appropriate method of determining the compensation to allow a percentage on receipts and disbursements, as in the case of guardians, although such allowance is not considered as fixing an imperative rule.[3] And in New York, it has been held that in the absence of proof as to the amount of labor performed by a receiver in the discharge of his trust, it was reasonable and proper to fix his compensation in accordance with the rates or commissions prescribed by law for the payment of executors or administrators, and that this course might be pursued when it did not appear that there was any peculiar difficulty in the duties performed.[4] And it has been held, when this method was

branch of commercial or other business, nor upon the special qualifications and standing of the person who may happen to perform the services. The question of compensation being reserved for the full court, it was held that this rule was the correct one. The court, Ames, J., say, p. 570: "The rule adopted as to the compensation of the receiver was entirely correct. The court does not regulate the compensation of its officers upon the basis of a fixed commission upon the amount of money passing through their hands, but allows them such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability, and competent for such duties and services." But see Cowdrey *v.* The Railroad Co., 1 Woods, 331.

[1] Jones *v.* Keen, 115 Mass., 170.

[2] Abbott *v.* Rappahannock Steam Packet Co., 4 Md. Ch., 310.

[3] Magee *v.* Cowperthwaite, 10 Ala., 966.

[4] Muller *v.* Pondir, 6 Lans., 481. See, also, Bennett *v.* Chapin, 3

adopted, that the receiver was entitled to commissions on the value of all the assets taken out of his hands and delivered to the parties by an order of court settling the suit by consent of the parties,[1] and also entitled to commissions upon both his receipts and disbursements.[2] The courts of New York, however, although sometimes following the method above indicated, do not consider themselves bound by the rates fixed by law for executors and administrators, and still regard the question as one to be determined by the court in the absence of any legislation regulating the subject.[3]

§ 786. When receivers have been appointed in place of executors of the estate of a deceased, and have acted in conjunction with a remaining executor appointed under the will of the deceased, it has been regarded as a fair and equitable mode of making compensation for their services to deal with them as trustees or executors under the will, having real and personal estate in charge, and to allow them the same rate of compensation or the same commissions upon their disbursements as are paid to such executors.[4]

§ 787. In the case of a receiver over a railway company, entrusted with the management and operation of the road, since his duties and responsibilities are much greater than those of an ordinary receiver appointed merely to take and hold money, a more liberal rate of compensation would seem to be permissible than in ordinary cases. And it is not regarded as a proper test, in such case, to inquire what another competent person would have been willing to do the work for, since the office is not put up at auction. The amount of such a receiver's compensation will, therefore, be graduated according to the peculiar duties and responsi-

Sandf., 673; Howes *v.* Davis, 4 Ab. Pr., 71.

[1] Bennett *v.* Chapin, 3 Sandf., 673.

[2] Howes *v.* Davis, 4 Ab. Pr., 71.

[3] Gardiner *v.* Tyler, 3 Keyes, 505; S. C., 2 Ab. Ct. Ap. Dec., 247; Baldwin *v.* Eazler, 34 N. Y. Supr. Ct. R., 275. See Bennett *v.* Chapin, 3 Sandf., 673.

[4] Holcombe *v.* Executors of Holcombe, 2 Beas., 417.

bilities resting upon him in the control and management of the road.[1] And in determining the compensation to be paid to railway receivers for their services, it is proper to consider their fitness for their duties, their business and financial experience, the time devoted to their trust, and the diligence

[1] Cowdrey *v.* The Railroad Co., 1 Woods, 331. Mr. Justice Bradley, in his learned opinion in this case, says, p. 345: "It would hardly be a proper rule for governing this case, to inquire what another even competent person would have been willing to do the work for. The receiver's office is not put up at auction. His compensation is not fixed on that principle at all. The chancellor selects a person whom he regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation. Where a receiver is a manager as well as a mere receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. It requires a man of first rate qualities and attainments. Now, we have it in proof that the railroad presidents of the country receive various sums from $3,000 to $20,000 a year, many of $5,000, some of $10,000, a few above $10,000. Most of the defendant's witnesses think that $5,000 a year would be ample compensation to the receiver for his services, whilst most of the witnesses called for the receiver think that $15,000, coin, is not any too much; that he saved much more than that to the road, etc. The receiver's income before his appointment was, by the estimation of one witness, about $7,000 a year, said to be of a permanent character; all of which he was obliged to give up when he assumed the duties of the receivership; and he himself says, that he would not have consented to take the office for less than $15,000 a year. The previous salaries given by the defendant railroad company have been referred to as being only $5,000; and sometimes not so much as that. In view of all this evidence, of the assistance which the receiver had around him, and of the principles which the law lays down with regard to the compensation of a receiver, I am inclined to think that $10,000 in coin per annum would be a fair rate of compensation in this case. It seems to me that $15,000 is large, larger than what any (except two or three) of the presidents of our most important railroads in the country receive. It also seems to me that the peculiar duties, responsibilities and accountability of a receiver entitle him to a larger amount than would be demanded by the head officer of an ordinary railroad of this size and business. An allowance of $10,000 coin per annum will, therefore, be made for the receiver Walker's compensation during the time he was such receiver."

and thoroughness displayed in the discharge of their duties.[1] So it is proper to allow a railway receiver additional compensation for services rendered by him as superintendent and as attorney, when he has performed such services in addition to those of receiver, thereby saving the expense of employing such additional services.[2] And in general it may be said, that the courts are inclined to treat the compensation of a receiver over a railway as resting largely in the discretion of the court appointing him, and when the testimony is conflicting as to the value of his services, an appellate court is not inclined to interfere with the exercise of such discretion.[3] But when the same person is appointed receiver over a railway in two different suits brought by different parties in a state court, one of which is removed to the federal court, which court fixes the amount of the receiver's compensation in that case and finds a balance due from him, which he is ordered to pay into court, he is not entitled to have such amount refunded to him in payment of his compensation afterward fixed in the suit in the state court, the parties to the former suit not having been heard as to the amount of such compensation in the latter suit.[4]

§ 788. A receiver is entitled to compensation for his services, although the actual work of managing the property entrusted to him is performed by others, as in the case of farms or plantations in the receiver's custody, which he manages by overseers appointed and employed by himself, and for whose management he is responsible.[5] But if his compensation is limited by statute to a commission upon his receipts and disbursements, such commission will be computed only upon the amount actually received and disbursed

[1] McArthur *v.* Montclair R. Co., 27 N. J. Eq., 77.

[2] Farmers Loan & Trust Co. *v.* Central Railroad, 8 Fed. Rep., 60.

[3] Hinckley *v.* Railroad Co., 100 U. S., 153.

[4] *In re* Hinckley, 3 Fed. Rep., 556.

[5] Price *v.* White, Bail. Eq., 240. And it was held that, in such a case, receivers being paid by commissions, the receiver was entitled to the usual commissions, although they might seem to be more than a reasonable compensation for the services rendered.

by him. And if, under the order of the court, he has permitted the business to be principally conducted by the parties in interest, who have transacted the business as before the receivership, making purchases and sales and receiving and disbursing moneys, the receiver will not be allowed commissions upon their receipts and disbursements.[1] So when the compensation is fixed by statute by a commission upon receipts and disbursements, a second receiver, appointed upon the death of a former one, who succeeds to his duties and receives the funds which were in his hands at the time of his death, is not entitled to a commission thereon when such commission had been paid to the former receiver. In such case, it is the service or duty of collecting the fund which entitles the receiver to a commission, and not the mere receipt of money from his predecessor who had already received a commission for its collection.[2]

§ 789. While the courts, in cases where receivers have been paid by a commission or percentage upon the funds received, have sometimes allowed them to make annual rests, and to charge their commissions upon the amounts as thus ascertained, a receiver will not be allowed to make a new rest every time he makes a deposit in bank, or to begin with full commissions from the date of such rest.[3]

§ 790. A receiver will not be allowed extra compensation for his services and expenses incurred by him in making journeys to a foreign country, for the purpose of prosecuting legal proceedings to recover money due to the estate, when such journeys have not been expressly authorized by the court, even though authorized and approved by many of the parties interested in the estate. And in passing upon the question of compensation in such a case, the court will not consider any agreements made by the parties in interest with the receiver, with regard to his undertaking such journeys, or his compensation therefor.[4]

[1] *In re* Woven Tape Skirt Co., 85 N. Y., 506.

[2] Attorney-General *v.* Continental Life Insurance Co., 32 Hun, 223.

[3] Bennett *v.* Chapin, 3 Sandf., 673.

[4] Malcolm *v.* O'Callaghan, 3 Myl. & Cr., 52.

§ 791. Where, under the laws of a state, the compensation of receivers is fixed at a certain percentage on their receipts and disbursements, and the receiver of an insolvent insurance company holds premium notes due to the company from its stockholders, in trust for the double purpose of paying the creditors of the corporation and of distributing the surplus among the stockholders, if he surrenders a portion of the notes to the shareholders by order of court, it may be regarded as so much money received and paid over for the purposes of the trust, and he will be allowed his commission thereon. In such case, however, the commission will be allowed only upon the actual value of the notes, and not upon such notes as were not collectible.[1]

§ 792. It would seem that a receiver has no vested right, by virtue of his appointment, to collect the entire estate over which he is appointed, when persons indebted are willing and offer to pay money due into court, thereby avoiding a large compensation or poundage to which the receiver would be entitled if the money passed through his hands.[2]

§ 793. When a receiver over the estate of a minor voluntarily and without an order of court attended a survey of the estate, the expenses of which were paid out of the estate, it was held that he was not entitled to any extra remuneration for his own services in the matter.[3]

§ 794. Under the practice of the Irish Court of Chancery, it is held that if the court, in appointing a receiver, does not intend that he shall receive any compensation or poundage, it should be so expressly provided in the order of appointment, and if not thus provided, he is entitled to his compensation *ex debito justitiæ*.[4] But when, as is frequently the practice in that court, a receiver is appointed by consent of the parties, the consent should fix the amount of salary which he shall receive, since otherwise the court will not allow him any compensation.[5]

[1] Van Buren *v.* Chenango County Mutual Insurance Co., 12 Barb., 671.

[2] Haigh *v.* Grattan, 1 Beav., 201.

[3] *In re* Ormsby, 1 Ball & B., 189.

[4] Bevan *v.* White, 8 Ir. Eq., 675.

[5] Burke *v.* Burke, Flan. & K., 89.

§ 795. While there are some cases to be met with in the reports in which the plaintiff partner, in an action for a dissolution of a partnership and for a receiver, has been himself appointed receiver, the practice may be regarded as an unusual one, and only to be upheld on the implied condition that he will discharge the duties of the office free of charge to the fund or estate. Such a receiver will not, therefore, in passing his accounts, be allowed any compensation for his own services.[1] And when a surviving partner is made a receiver of the firm at his own request, he is not entitled to compensation for his services in the absence of any stipulation to that effect, since his duties as receiver, in such case, are no more than would have been his duties as surviving partner, for which he would have been entitled to no compensation, in the absence of any contract to that effect.[2]

§ 796. A receiver can not recover judgment for his services against the parties to the original suit in which he was appointed, by a motion made in that suit, and it is error to so enter judgment against them, there being no action pending in which such a judgment is proper. The appropriate method of procedure is to have his compensation fixed by the court, to be allowed out of the assets in his hands, and the amount thus determined to be due him may be taxed as costs in the action.[3] But, while the receiver's compensation is usually paid out of the fund placed in his hands, a different course may be adopted when the order appointing the receiver is revoked, and when he is directed to return the property to the persons entitled thereto. And it is proper, under such circumstances, for the court, in its discretion, to require the payment of part of the compensation out of the fund in the receiver's hands, and to tax the balance as costs against the plaintiff, the unsuccessful party in the cause.[4]

[1] Brien *v.* Harriman, 1 Tenn. Ch., 467. See, also, Todd *v.* Rich, 2 Tenn. Ch., 107.

[2] Berry *v.* Jones, 11 Heisk., 206.

[3] Hutchinson *v.* Hampton, 1 Montana, 39.

[4] French *v.* Gifford, 31 Iowa, 428. This was the case of a receiver of a

The court is governed, in such case, by the consideration of the injustice of allowing a receiver his compensation, in all cases, from the funds in his hands, regardless of the legality of his appointment; since, if such a rule were to be rigorously applied, innocent persons might frequently sustain great loss.[1] But when no question is made as to the legality or propriety of appointing the receiver, and he closes up his receivership in pursuance of the order appointing him, his compensation should be paid from the funds in his hands, and no part of it should be taxed as costs against

savings bank, whose appointment had been revoked and who had been ordered to deliver back the money and assets received. The court, Miller, J., say: "It is insisted by plaintiff's counsel that the compensation of the receiver should be paid out of the fund of which he had the custody and charge, and that he should be permitted to retain the same therefrom. Numerous cases have been cited to show that such is the uniform practice. Upon an examination of these cases it will be found that, in every case, there was no question made as to the legality or propriety of the appointment of the receiver; that, in each case, the receiver closed up the business and settled his accounts in pursuance of his appointment. The receivership, in each case, was for the benefit of those interested in the fund, and he was paid therefrom, which is only another method of apportioning the costs upon those entitled to the fund. The only case which has been brought to our attention, in which the order appointing the receiver was set aside, is the case of Verplanck *v.* The Mercantile Insurance Co., 2 Paige, 438, and in that case the chancellor ordered the receiver to turn over all the property, without allowing him any commissions therefrom. We think it would be an unjust and inequitable rule if, in all cases, the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule, innocent persons might be made to suffer great loss. The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful, and against the unsuccessful, party. Rev., § 3449. And they will be so adjudged, unless there exists some equitable consideration to justify a different disposition, or the case is otherwise provided for by law. In cases like the one under consideration, we may adjudge the costs to one or either of the parties, or apportion them." The court accordingly directed that the fund be charged with one-third of the receiver's compensation, and the plaintiff with the remaining two-thirds.

[1] French *v.* Gifford, 31 Iowa, 428.

the plaintiff.[1] So when a court of equity takes property under its charge by appointing a receiver, the property itself is chargeable with the necessary expenses of the receivership, including the compensation of the receiver. And, in such case, the person who, under the final decree of the court, acquires the property or its proceeds, acquires it *cum onere* and chargeable with the amounts due to the receiver for services and advances.[2] But if the appointment of the receiver is for the equal benefit of both parties to the action, as in a suit for the settlement of partnership affairs, the receiver's compensation should be borne by both parties equally.[3] And if the court appointing a receiver denies him all compensation for his services, he is entitled to appeal from such order.[4]

[1] Radford *v.* Folsom, 55 Iowa, 276.

[2] Beckwith *v.* Carroll, 56 Ala., 12.

[3] Johnson *v.* Garrett, 23 Minn., 565.

[4] Herndon *v.* Hurter, 19 Fla., 397.

CHAPTER XIX.

OF THE RECEIVER'S ACCOUNTS.

§ 797. Receivers being officers of the court appointing them, they are required to account to the court for all receipts and disbursements in the course of their receivership. And it is the duty of a receiver to file his accounts when required by the court, in order that all claims for compensation or disbursements out of the fund in his hands may be properly considered by the court.[1] Courts of equity are disposed to hold receivers to great strictness in rendering their accounts, and while it would seem to be competent for a receiver to delay passing his accounts at the required time, by consent of all parties in interest, when they are capable of giving consent, yet if some of the parties are minors he will not be justified in delaying, even with their consent.[2] And it is held to be the receiver's duty to come in and account to the court at the proper times, without any process or rule upon him for that purpose, and the rules regulating proceedings between litigant parties afford no analogy to the case of a receiver, the latter being an officer of the court and not a party litigant.[3] So a receiver being an officer of the court, and the fund in his hands being regarded as in the custody of the court itself, he is not entitled to a jury to pass upon his accounts.[4]

§ 798. A receiver will not ordinarily be permitted to make any expenditures which will seriously diminish the

[1] Adams *v.* Woods, 8 Cal., 306. See, also, Mabry *v.* Harrison, 44 Tex., 286.

[2] Dease *v.* Reilly, 2 Con. & Law., 441; S. C., 4 Dr. & War., 284.

[3] McBride *v.* Clarke, 1 Mol., 233.

[4] Akers *v.* Veal, 66 Ga., 302.

fund entrusted to his charge, without the sanction and authority of the court, and it is his duty to apply to the court for instructions as to expenditures, and to keep regular accounts of all items of receipts and expenditures. He can not in these matters act upon his own discretion, but is held to a strict accountability to the court, and must produce satisfactory vouchers and proof for all his charges against the fund entrusted to his keeping.[1] It does not, however,

[1] Hooper *v.* Winston, 24 Ill., 353. This was a writ of error to reverse a decree regulating the distribution of the fund in the hands of a receiver over certain hotel property. The general principles regulating the disbursements of receivers are very clearly stated by Mr. Justice Breese, as follows, p. 365: "The other claim set up by the receiver, to be allowed such expenses as he has chosen to set down, to keep the house in operation, we are constrained to say we see no ground upon which to base it. The receiver claims that in this matter he was vested with a discretionary power, and therefore the court had no authority to examine into the mode or manner of its exercise; that he was merely the private agent of these parties, that whole subject being left to his own judgment. We do not deny that he had some discretion in this matter, but it was very limited. We hold, being an officer of the court, he should have applied to the court for leave to make these expenditures, and he is amenable to the court for the exercise of all his powers. As receiver and trustee for parties litigant, it was his manifest duty to have kept regular accounts, item by item, of all the expenses of the house and of the receipts arising from it, and from all other sources from which money might have come into his possession. He should show an account current of the house, embracing therein the stock he found on hand, the purchases of every description for the house, and the receipts of the house. That there were large receipts is unquestionable, yet no account has been rendered of any. That a bar furnished with more than fifteen hundred dollars worth of liquors should not, in Chicago, produce any returns, is incomprehensible. Failing to show any account current, every presumption ought to be against him, and for all his charges against the fund entrusted to his keeping, he should show satisfactory vouchers and proofs. He has shown none in the several reports he has made to the court. His judgment was not the limit of the expenditures, but the court, he being one of its officers, has a supervisory power over his acts, and he is amenable to its judgment as to the necessity of these expenditures, in order to keep the house in operation, and he is certainly accountable for the receipts. . . In the management of the McCardel House, although the receiver was required to keep it in operation until the sale, he

follow that in every case in which he neglects to obtain an order of court authorizing a particular payment out of the fund in his possession, he will be denied reimbursement. And when a receiver of the effects of a partnership is authorized by the court to prosecute suits for the recovery of the assets, a sum paid by him as a reward for the recovery of lost books of the partnership has been regarded as a necessary and appropriate expenditure, in the prosecution of suits for the protection of creditors, and has been allowed in his accounts.[1] So when a receiver finds the property insured and continues such insurance, the court, in passing his accounts, may allow such insurance, if paid in good faith and if necessary for the protection of the property, even though such expenditure had not been authorized by any order of the court.[2] And a receiver is entitled to charge in his account for the necessary watching of the property in his custody.[3] Under the English chancery practice, when a receiver had laid out money without a previous order of court for that purpose, the matter was referred to a master to examine whether the transaction was beneficial to the parties in interest, and if found to be so, the receiver was allowed the amount thus expended.[4]

§ 799. It may be said generally, that a court, in passing upon the accounts of its receiver, will not ratify any expenditure which has not been necessarily incurred for the benefit of the estate committed to his charge. And when a receiver has stepped outside the order of his appointment and assumed the role of actor, and has incurred large and unwar-

had, as an officer of the court, but very little discretion allowed him, and should have applied to the court, by a brief petition, setting out the facts and asking for a reference, whether such and such expenditures would be for the benefit of the interested parties, and necessary to keep the house in operation, or for whatever other purpose the expenditure may have been desired. No single act calculated to diminish seriously the fund could the receiver do on his own mere motion, and in the exercise of his discretion."

[1] Adams *v.* Woods, 15 Cal., 206.

[2] Brown *v.* Hazlehurst, 54 Md., 26.

[3] Howes *v.* Davis, 4 Ab. Pr., 71.

[4] Tempest *v.* Ord, 2 Meriv., 55.

ranted expenses for services which he might properly have performed himself, and has done this without the consent of or notice to either of the parties to the action or to the court, he will not be allowed such expenses.[1] So when he has, without authority from the court, appointed a deputy receiver to perform duties which he himself might and should have performed, he will not, in passing his accounts, be allowed the compensation paid to such deputy.[2] When the receiver has paid no money for particular services, but has arranged with the person performing such services that he shall receive such compensation as the court may allow, the facts should be so reported by the receiver in his account, and parties in interest who are dissatisfied with the account, in whole or in part, may appeal from the final order of the court thereon.[3]

§ 800. Under the practice of the English Court of Chan-

[1] Corey *v.* Long, 43 How. Pr., 504.

[2] Corey *v.* Long, 43 How. Pr., 504.

[3] Adams *v.* Woods, 8 Cal., 306. "It is the duty of the receiver," says Mr. Justice Burnett, p. 316, "to file his accounts when required by the court, and if he fail in this, the court, upon application of a party in interest, or upon its own motion, will compel him to do so. When his account is filed, all claims against the fund for disbursements or engagements made by the receiver would properly come before the court for consideration. When the receiver has paid no money, but has made an arrangement with a party to receive such compensation as the court may allow, he should report the facts, leaving a blank for the sum that may be allowed. If any of the parties employed by the receiver should not be satisfied with the account, in whole or in part, they could then make their objections. And if any one or more of them should feel aggrieved by the final order of the court, they should all appeal, and all the questions should come up before this court in one case. However extensive the record and numerous the parties might be, the labor of this court and expense to the parties would not in this way be increased but diminished. But if a separate reference and separate appeal were allowed in regard to each separate claim upon the fund, then the proceedings would be greatly prolonged, to the injury of all parties. And when the appeal should be taken, it would only be necessary for the court below to order the receiver to retain so much of the fund in his hands as might be necessary to pay the disputed items, if finally allowed, and order the distribution of the remainder."

cery, a master's report upon a receiver's account did not require confirmation by the court, and did not, therefore, admit of exceptions. And the court would not enter into a consideration of any particular items of the account, but would, upon the petition of any person aggrieved, examine any principle upon which the master had proceeded which was alleged to be erroneous.[1] Under the Irish chancery practice, however, a more liberal rule prevails and the court will investigate the items of the receiver's account.[2] The English rule prevailed under the New York chancery system, and when a reference was had to a master for the purpose of settling the receiver's accounts, no order of confirmation of the master's report was required, nor were exceptions allowed to such report. And if a party in interest was dissatisfied with the allowance made by the master, his proper course was to apply to the court to review the account in such particulars as were objectionable, and the court would then consider objections as to the general principles on which the master had proceeded in taking the receiver's accounts, but would not take cognizance of objections to particular items.[3]

§ 801. A distinction is recognized between a master's report upon a receiver's account, and his report containing an account taken and stated by himself, or a report upon a matter referred to him for investigation. The distinction is based upon the fact that the receiver is himself an officer of the court, as well as the master, and that he states his own account and submits it to the master for inspection under order of the court, the master acting in place of the court, and in a judicial rather than a ministerial capacity. If the master adopts any erroneous principle in allowing the receiver's

[1] Shewell *v.* Jones, 2 Sim. & St., 170, affirmed 3 Russ., 522.

[2] Beytagh *v.* Concannon, 10 Ir. Eq., 351.

[3] Brower *v.* Brower, 2 Edw. Ch., 621. And see, as to the practice in New Jersey in regard to entertaining exceptions to receiver's accounts, and the time and manner of presenting such exceptions, Mechanics Bank of Philadelphia *v.* Bank of New Brunswick, 2 Green Ch., 437; Richards *v.* Morris Canal & Banking Co., 3 Green Ch., 428.

accounts, the court, on petition of the proper parties, may refer the matter back to him for correction. And in determining such question the court will investigate the principles and rules adopted by the master in allowing the receiver's accounts, without examining the items in detail, or the evidence on which they rest, the latter duty being more especially within the province of the master, and being analogous to the province of a jury on questions of fact. If it is desired to take exceptions to the master's report upon the receiver's accounts, they should be first taken before the master; otherwise they will not be considered by the court. The object of the rule is twofold, being to afford the master an opportunity to reconsider his decision, and to enable the receiver to sustain his accounts by additional evidence, or to make such explanation as the case may require. And while the rule would not deter the court from directing an account to be reformed, if it contained manifest errors or improper charges, yet such errors should be clearly shown to exist, and their character should be such as to be shown by the proofs in the case, or by their intrinsic nature.[1] But a receiver is not entitled to an order of reference to examine and pass upon his accounts until he has presented a full and definite statement, itemizing the various matters, and verifying the account under oath.[2]

§ 802. A court of equity will not ordinarily entertain an application from a stranger to the cause to have the receiver pass his account, when no special ground is shown for such order.[3] And a receiver can not be compelled, pending litigation, to account to a party to the suit, or to furnish him with statements of the condition of his accounts. Being an officer of the court and not of the parties litigant, he is

[1] Cowdrey *v.* The Railroad Company, 1 Woods, 331. And see this case as to principles governing the court in allowing a receiver's accounts for expenses incurred in operating a railway.

[2] People *v.* Columbia Car Spring Co., 12 Hun, 585.

[3] Colburn *v.* Cooper, 8 Ir. Eq., 510.

only required to account to the court from which he derives his appointment.[1] But when the receiver in a cause has never made a full or complete report of the income and disbursements of the estate committed to his care, any party to the cause may move for such an account; and it is the duty of the receiver himself, as an officer of the court, to make a full report and to pass his accounts at least once a year, since in no other way can the parties to the cause be informed as to their rights or the court act understandingly.[2]

§ 803. In the absence of any special directions of the court, it is the duty of a receiver to keep the fund entrusted to him entirely separate and distinct from his individual funds. If he deposits the money in bank for safe keeping, it should be deposited to a separate account in his name as receiver, so that the fund may at all times be traced and identified.[3] And when, in disregard of this duty, the receiver violates his trust by mixing the trust fund with his own money, keeping the whole in one common bank account in his own name, and using large sums as temporary loans from time to time, he is guilty of such a breach of trust as to render himself liable for interest upon the fund. And such interest will be charged him in the final settlement of his accounts, regardless of whether he himself derived profit from the fund or interest from the loans.[4] So when he withdraws funds from his account as receiver and deposits them in another bank to his private account, and in the settlement of his accounts he declines to explain the matter, or to state what sums he has thus deposited to his individual account, he is properly chargeable with interest.[5]

[1] Musgrove *v.* Nash, 3 Edw. Ch., 172.

[2] Lowe *v.* Lowe, 1 Tenn. Ch., 515; Stretch *v.* Gowdey, 3 Tenn. Ch., 565. And see, as to the rules and orders of the English High Court of Chancery upon the subject, the opinion of Chancellor Cooper in this case.

[3] Utica Insurance Co. *v.* Lynch, 11 Paige, 520; Hinckley *v.* Railroad Co., 100 U. S., 153; *In re* Commonwealth Fire Insurance Co., 32 Hun, 78.

[4] Utica Insurance Co. *v.* Lynch, 11 Paige, 520.

[5] Hinckley *v.* Railroad Co., 100 U. S., 153.

So, too, if he deposits the funds of his receivership in bank with his personal funds in his private account, against which he draws his individual checks from time to time, thereby deriving individual benefit from the funds of the receivership, he may be charged with interest.[1] But the fact that the receiver has deposited the funds of his receivership with his own private funds in bank will not render him liable to pay interest thereon, when it is not shown that he has used any part of the funds pertaining to the receivership, or in any manner acquired any profit therefrom.[2]

§ 804. In general it may be said that receivers will not be allowed to make interest for their own benefit upon funds in their hands, and will be answerable for interest upon their balances.[3] And a receiver is chargeable with interest upon funds derived from a sale of property, either when he receives interest or when he might have done so.[4] If he retains funds in his hands after the time when they should be paid over, he may be required to pay interest thereon at the time of rendering his next account.[5] And when he is guilty of negligence in not passing his accounts at the time required, he will be compelled to pay interest upon the balance in his hands from the time when it was his duty to account, or to pay the money into court.[6] He will not usually be required, however, to pay interest from the very moment of receiving the money, but only from the time when it should have been paid into court.[7] But in the interval between receiving the money and the time of passing his accounts, he can not make interest on the fund for his own benefit, and if he receives a sufficient sum to be invested, he should apply for an order to have it paid into

[1] *In re* Commonwealth Fire Insurance Co., 32 Hun, 78.

[2] Radford *v.* Folsom, 55 Iowa, 276.

[3] Lonsdale *v.* Church, 3 Bro. C. C., 41; Shaw *v.* Rhodes, 2 Russ., 539.

[4] Hooper *v.* Winston, 24 Ill., 353.

[5] Harman *v.* Forster, 1 Hog., 318.

[6] Fletcher *v.* Dodd, 1 Ves. Jun., 85; —— *v.* Jolland, 8 Ves., 72; Potts *v.* Leighton, 15 Ves., 273.

[7] Potts *v.* Leighton, 15 Ves., 273.

court, in order that it may be made productive to the estate.[1] When receivers have illegally appropriated a balance in their hands they are chargeable with interest on such balance, and if one of them has made the misappropriation and the other has negligently permitted it, they will be held jointly liable therefor in the final settlement of their accounts.[2] And when a receiver had retained the funds in his hands for a long period for his own benefit, he was charged interest on his yearly balances, and the interest was computed by annual rests, that is upon the balance in his hands at the end of each year.[3] So if a receiver, acting in good faith, but without the direction or authority of the court, loans the funds belonging to his receivership, and charges himself with the amounts received for interest, no losses occurring by reason of such loans and the estate being benefited thereby, he should not be charged with interest beyond the amount actually received by him.[4] But it is improper to require a receiver to pay interest upon the money in his hands in the absence of any evidence upon the question of his liability to pay such interest.[5] And while a receiver is not allowed to make any personal profit out of his office, aside from his compensation, yet the rule will not be extended to require him to account for money which he has realized, not by any act done or omitted as receiver, but by reason of the opportunity afforded by his receivership. Thus, a receiver, who had been engaged in business as a broker before his appointment, and who while

[1] Shaw *v.* Rhodes, 2 Russ., 539.

[2] Commonwealth *v.* Eagle Fire Insurance Co., 14 Allen, 344.

[3] Foster *v.* Foster, 2 Bro. C. C., 616. In 1796 a general order was entered by the English Court of Chancery, requiring receivers to pass their accounts and pay the balances in their hands into court annually, and that in default thereof their salary or compensation should be disallowed, and they should be required to pay interest on their balances at the rate of five per cent. per annum. See General Order, 15 Ves., 278. And see comments thereon by Lord Eldon in Potts *v.* Leighton, id., 273.

[4] Attorney-General *v.* North America Life Ins. Co., 89 N. Y., 94, affirming in part S. C., 26 Hun, 294.

[5] How *v.* Jones, 60 Iowa, 70.

acting as receiver of an insolvent bank is paid by mortgage debtors of the bank a commission for procuring new loans with which to pay their indebtedness to the bank, will not be required to account for such commissions when he has acted in good faith and without neglecting his duties as receiver.[1]

§ 805. Receivers are entitled, in the settlement of their accounts, to payments made on account of legal services and counsel fees.[2] And such fees, when paid by the receiver in good faith in collecting moneys to which he is entitled, the disbursements being necessary and beneficial to the parties ultimately entitled to the fund, should be paid from such fund in the settlement of the receiver's accounts.[3] But *ex parte* orders for the payment of fees to the counsel for the receiver, who is his law partner, such orders being obtained by the receiver or by the counsel himself without notice to the parties in interest, are not conclusive upon a reference to settle the receiver's accounts, and he will still be required to show that such payments were justified by services rendered.[4] And upon a petition by the attorney for the receiver for an allowance for his services, the court should not allow more than the amount claimed in the petition, although there may be testimony in the case which would warrant a larger allowance.[5] And the courts are usually indisposed to allow a receiver any payments made to counsel for services when the employment has not been authorized by the court.[6]

[1] Special Bank Commissioners *v.* Franklin Institution, 11 R. I., 557.

[2] Howes *v.* Davis, 4 Ab. Pr., 71.

[3] How *v.* Jones, 60 Iowa, 70.

[4] *In re* Commonwealth Fire Insurance Co., 32 Hun, 78. As to allowances for counsel fees out of the funds of the receivership to claimants against such funds, and to intervening creditors, see People *v.* Security Life Insurance and Annuity Co., 23 Hun, 596; Attorney-General *v.* Continental Life Insurance Co., 27 Hun, 195; Attorney-General *v.* Continental Life Insurance Co., 31 Hun, 623. As to the practice in fixing the amount of counsel fees for services rendered a receiver of an insolvent life insurance company under the statutes of New York, see People *v.* Knickerbocker Life Insurance Co., 31 Hun, 622.

[5] Richter *v.* Schroeder, 110 Ill., 112.

[6] Corey *v.* Long, 43 How. Pr., 504.

And a receiver is not entitled, on settlement of his accounts, to an allowance for counsel fees paid by him out of a particular fund, in an unsuccessful defense of an action brought against him by a person entitled to that fund, and in an appeal taken in such action; especially when the original action is brought against him and the appeal is prosecuted by him in his personal capacity, and not as receiver.[1] And when a person, not in interest in the controversy, has fraudulently procured his own appointment as receiver of a fund in litigation, and has obtained possession of the fund, in opposition to the wishes and under protest of all the parties in interest and of all parties to the cause, he will not be allowed to charge upon the fund payments made to counsel employed by him in defending his appointment, the order being reversed on appeal.[2] Nor will counsel fees be allowed for services rendered in resisting an application for the removal of a receiver, when the application is sustained.[3] But the receiver's expenses and fees for counsel and witnesses, in defending himself against a motion for his removal, have been allowed him when the court was satisfied that he had acted with entire good faith and strict integrity; and when the charges against him have been withdrawn by an amicable arrangement between the parties, and when he has then voluntarily surrendered his trust to the court.[4] And a receiver of a lunatic's estate may be allowed proper and reasonable counsel fees, for advice and assistance rendered him in the discharge of his official duty, and in aiding him to protect the estate.[5]

§ 806. The courts have usually been averse to allowing a receiver to employ as his counsel the counsel of either party to the cause, when there are conflicting interests. And when counsel for the plaintiff, in an action for the dis-

[1] Utica Insurance Co. *v.* Lynch, 2 Barb. Ch., 573.

[2] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 223.

[3] *In re* Colvin, 4 Md. Ch., 126.

[4] Cowdrey *v.* The Railroad Co., 1 Woods, 331.

[5] *In re* Colvin, 4 Md. Ch., 126.

solution of a partnership, had also acted as associate counsel to the receiver, the court refused to allow a claim for compensation for such services.[1] But where the counsel of one of the parties has been employed by the receiver, not adversely to either of the parties, but to advance the common interest of both, such employment does not fall within the principle of the rule prohibiting the receiver from employing the counsel of either party. In such case, therefore, it is proper to allow the receiver, in passing his accounts a reasonable sum for counsel fees.[2] But in the settlement of his accounts, a receiver has no authority to credit himself with counsel fees paid for or in behalf of either of the parties to the cause. If, however, upon final settlement, sufficient funds remain belonging to the parties for whom he has made such advances, he may be reimbursed out of such funds if the amounts so advanced were reasonable and proper, or made at the request of the party charged.[3]

§ 807. When a receiver is appointed in a suit in chancery against an administrator to recover property of the deceased, he will not be allowed to credit himself in his account with an amount due him for services which he has rendered as solicitor for the administrator in defending the suit, since this is properly a claim against the administrator, which should be allowed by the court of probate.[4]

§ 808. A receiver, in stating his accounts, will not be allowed to charge for counsel fees paid to himself for services rendered, he being an attorney, in addition to the legal costs properly taxable in suits prosecuted or defended by him. And it is deemed as unsafe to permit a receiver to contract with and to pay himself for such extra services, as it would be to permit him to become a purchaser of the

[1] Adams *v.* Woods, 8 Cal., 306. And see Bennett *v.* Chapin, 3 Sandf., 673.

[2] Bennett *v.* Chapin, 3 Sandf., 673. See Ryckman *v.* Parkins, 5 Paige, 543.

[3] Drake *v.* Thyng, 37 Ark., 228.

[4] Battaile *v.* Fisher, 36 Miss., 321.

trust property, which it is his duty to sell to the best advantage of the estate.[1]

§ 809. The costs of the appointment of a receiver are entitled to priority of payment out of a fund realized by him, before all other demands.[2] If, however, a receiver permits costs to accrue which he ought to have prevented, as if he neglects to pay rent due to the landlord upon premises subject to the receivership, he will be required to pay such costs out of his own pocket.[3] But a receiver who is discharged because of his inability to procure new sureties, will not be charged with the costs of appointing a new receiver.[4] And when it does not appear that a receiver has been guilty of any fraud or bad faith in his accounts, the costs of a reference for their settlement should not be charged against him, even though some items in his accounts are not allowed.[5]

§ 810. In an action prosecuted by the receiver of a corporation for the collection of money demands, where the action is carried on for the enhancement of the fund in the receiver's hands, for the benefit of those who shall be finally determined to be entitled thereto, if the receiver is unsuccessful in his suit, the defendant is entitled to costs. And such defendant will not be required to await the final distribution of the assets and to share *pro rata* with other creditors or parties interested, but he is entitled to an immediate order for payment of the costs out of any funds in the receiver's hands.[6] But it has been held to constitute no

[1] *In re* Bank of Niagara, 6 Paige, 213.

[2] Read *v.* Corcoran, 1 Ir. Ch., N. S., 235.

[3] Cook *v.* Sharman, 8 Ir. Eq., 515.

[4] Lane *v.* Townsend, 2 Ir. Ch., N. S., 120.

[5] Radford *v.* Folsom, 55 Iowa, 276.

[6] Columbian Insurance Co. *v.* Stevens, 37 N. Y., 536. The action was an ordinary suit at law by the receivers for the recovery of a money demand. Defendants had judgment for their costs of suit, and applied by motion for an order that the receiver pay such costs out of funds in his hands. Woodruff, J., says, p. 537: "In an action prosecuted by receivers for the collection of alleged money demands,

ground for sustaining a motion to require a receiver to pay a judgment for costs, that he has recently been in possession of funds sufficient to pay the judgment, or that he has paid other and larger demands, since the receiver is not bound to render a general account of his trust to each creditor who may assail him with such a motion.[1]

§ 811. Under the English chancery practice, it was held that while a receiver could not be allowed his costs and expenses in defending actions without leave of court, if he failed in the defense, yet if he was successful he was entitled to his costs, although he had defended without the sanction of the court.[2] But a receiver of an infant's estate will not be allowed his costs and expenses incurred in defending actions without the sanction of the court, since it

instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, is the defendant entitled to costs to be paid to him immediately, or must he stand as a general creditor to await the final administration and receive only (as the case may be) his distributive share of the fund *pro rata*, with those for whose benefit he has been subjected to a groundless litigation? . . It was conceded on the argument that the costs in question are chargeable upon and are to be collected out of the fund. This could not well be denied, and yet, in a case in which it does not appear by anything stated in the papers that there are other claims on that fund, of any sort, except the interests of the stockholders of the company, it would seem to follow, as of course, that the receiver should have been directed to pay those costs. Such an order is the appropriate mode of reaching funds in the receiver's hands. Not being in form a party to the action, no execution could reach the property he holds, and being the custodian of the fund as an officer of the court, he is subject to immediate direction to pay it to a party entitled. . . The receiver is, *pro hac vice*, the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity toward third parties that actions like the present should be prosecuted by the company or such representative, otherwise than at the expense and risk of the fund which it is sought thereby to increase."

[1] Devendorf *v.* Dickinson, 21 How. Pr., 275. See, as to liability of receivers for costs under the New York code of procedure, Marsh *v.* Hussey, 4 Bosw., 614.

[2] Bristowe *v.* Needham, 2 Ph., 190.

is improper for him to incur any expense to the estate without leave of court.[1] And when a receiver has improvidently instituted proceedings at law in a certain form of action, which he has afterward abandoned under the advice of counsel, and has brought his action in another form, in which he is successful, it would seem that he can not be allowed the costs of the former proceeding, but must bear them himself.[2] Where, however, an application was made and proceedings were had against a receiver, but the application was refused with costs, which the applicant was wholly unable to pay, the receiver was allowed his costs, as between solicitor and client, out of the fund in his hands.[3]

§ 812. Under the English chancery practice, a receiver was not allowed his costs for appearing in response to a petition for his final discharge, since he need not have appeared, being merely an officer of the court, and not a party interested.[4] And a receiver was not usually allowed to take any steps, by petition or otherwise, for the satisfaction of his costs and expenses, this being left to the action of the parties to the cause. If, however, the parties had been guilty of long-continued negligence and delay in moving for the taxation and payment of the receiver's costs, he was held justified in presenting a petition himself for their allowance and payment.[5]

§ 813. When a receiver has used property entrusted to his care in and about his private business, thereby deriving profit to himself, he is properly chargeable in his account for the hire of the property.[6] But he will not be allowed to charge in his account for money advanced by him in payment of charges against his predecessor in office, who was largely in arrears on account of the funds entrusted to

[1] Swaby *v.* Dickon, 5 Sim., 629.

[2] *In re* Montgomery, 1 Mol., 419.

[3] Courand *v.* Hanmer, 9 Beav., 3.

[4] Herman *v.* Dunbar, 23 Beav., 312.

[5] Ireland *v.* Eade, 7 Beav., 55.

[6] Battaile *v.* Fisher, 36 Miss., 321. And see as to liability of a receiver of rents and profits to account, when he has been appointed by agreement of the parties, Ford *v.* Rackham, 17 Beav., 485.

him as receiver, so that he himself would not have been entitled to the credit on his own account.[1]

§ 814. In case of rival claimants to a fund in the hands of a receiver, he may institute an action in the nature of a bill of interpleader, to compel them to interplead and determine their rights; and pending such action he may proceed to render his accounts and pay over the fund into court, to abide the result of the interpleader.[2] But a plaintiff who has procured the appointment of a receiver can not dismiss his bill and have the receiver discharged without first requiring him to pass his accounts.[3]

§ 815. A receiver being an officer of the court, and neither party to the litigation being responsible for his misfeasance or malfeasance, it is held that plaintiffs in the action in which he is appointed should not be delayed in the collection of the amounts due them, until the close of a litigation concerning the receiver's accounts, which may extend over a considerable period of time, since this would be a manifest injustice and hardship upon plaintiffs.[4]

§ 816. Where a receiver had been very irregular and careless in his accounts, so that it was impossible to determine from them what were the balances in his hands for which he was chargeable, it was deemed proper that he should be specially ordered to bring in his accounts every year within a specified time, and that he verify by affidavit the amount of his receipts and disbursements and the balances in his hands at the date of his reports.[5]

§ 817. In case of the death of a receiver, equity has no jurisdiction, upon a petition in behalf of parties interested, to order the executors of the deceased receiver to bring in and pass his accounts, and to pay the balance found due out of his assets.[6] If, however, the receiver dies pending pro-

[1] Battaile v. Fisher, 36 Miss., 321.

[2] Winfield v. Bacon, 24 Barb., 154.

[3] White v. Lord Westmeath, 2 Hog., 33.

[4] Milwaukee & Minnesota R. Co. v. Soutter, 2 Wal., 510.

[5] Bertie v. Lord Abingdon, 8 Beav., 53.

[6] Jenkins v. Briant, 7 Sim., 171.

ceedings against him for an accounting, the court has power to make an order against his executors reviving and continuing the accounting as against them.[1] But where a receiver, appointed for the benefit of a tenant for life, never acted, but permitted the solicitor in the cause to act as receiver and to collect all the rents, and after many years the executor of the receiver was compelled to pay into court the amount found to be due, notwithstanding the solicitor had previously paid a portion to the tenant for life, it was held that the executor could not maintain a petition for an accounting of what was paid, and for a lien upon the estate for the amount which should be found due upon the accounting.[2]

§ 818. When a receiver, after his discharge, had not paid into court the balance found due upon his account within the time required, he was ordered to pay the same, together with the amount which had been allowed him for his salary, with interest on both sums from the date first appointed for payment.[3] But when a receiver had delayed passing his account in order to obtain additional rent from a tenant, thereby benefiting the estate, he was allowed his commission or poundage thereon and the costs of passing his account;[4] so, also, when the receiver had delayed passing his account at the request of the parties, in order to save expense pending a compromise.[5]

§ 819. It has been held that a receiver over a minor's estate may, upon the minor coming of age, be properly required to account to him from the beginning concerning the management of his affairs, although he has before presented his accounts from time to time to the court.[6]

§ 819*a*. When a receiver is charged with having allowed and paid, under an order of court, claims which are ficti-

[1] *In re* Columbian Insurance Co., 30 Hun, 342.

[2] Gurden *v.* Badcock, 6 Beav., 157.

[3] Harrison *v.* Boydell, 6 Sim., 211.

[4] Flood *v.* Lord Aldborough, 8 Ir. Eq., 103.

[5] Purcell *v.* Woodley, 10 Ir. Eq., 422.

[6] Wildridge *v.* McKane, 2 Mol., 545.

tious and unfounded, the proper practice for a creditor desiring to contest such allowances is to apply to be made a party to the suit in which the order was made and to have such order vacated.[1] But when a receiver's accounts have once been passed and approved by the court, they are only assailable by a direct proceeding or petition, calling attention to some error, fraud or mistake in the accounts. And when there have been several receivers in the same cause, some of whose accounts have been passed and approved, and a general order is then made requiring the receivers to account before the master, such order does not require that the accounts already approved shall be reopened.[2]

§ 819 *b*. While a receiver, being a mere officer or custodian of the court, can not appeal from an order directing him to turn over the property or money in his hands, yet, if the order erroneously fixes the amount of property or money in his hands, and directs him to turn over more than is in his possession, he is entitled to an appeal from such order.[3] So he may appeal from a final decree settling his accounts and fixing the balance due from him, and for this purpose he occupies substantially the position of a party to the cause.[4] So the parties to the cause in which he is appointed, and who are interested in the fund in his hands, may appeal from a final decree settling the receiver's accounts.[5]

[1] Schenck *v.* Ingraham, 4 Hun, 67; S. C., 5 Hun, 397.

[2] Farmers Loan & Trust Co. *v.* Central Railroad, 2 Fed. Rep., 751; S. C., 1 McCrary, 352.

[3] How *v.* Jones, 60 Iowa, 70.

[4] Hinckley *v.* G., C. & S. R. Co., 94 U. S., 467.

[5] Hovey *v.* McDonald, 109 U. S., 150.

CHAPTER XX.

OF THE REMOVAL AND DISCHARGE OF RECEIVERS.

I. Removal for Cause.

§ 820. The subject of the removal or discharge of a receiver, although to a considerable degree regarded as a matter of practice and to be discussed as such, is, nevertheless, deemed of sufficient importance to merit a separate discussion. The power of a court of equity to remove or discharge a receiver whom it has appointed may be regarded

as well settled,[1] and it may be exercised at any stage of the litigation.[2] Indeed, it would seem to be a necessary adjunct of the power of appointment, and to be exercised as an incident to or consequence of that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions, or for other cause shown. And the cases upon this branch of the subject will be found to resolve themselves into two classes, viz., cases of removal or substitution for cause, and cases of discharge because of the necessity for the appointment having ceased to exist.

§ 821. As regards the power of a court of equity to remove a receiver for cause and to substitute another in his stead, it is to be observed that the exercise of the power is regarded as a matter properly resting in the sound discretion of the court, and hence to be governed by the circumstances of each particular case.[3] It is difficult, therefore, to frame any definite rules susceptible of general application, and the power of removal for cause is referred to the broad and undefined region of the discretionary jurisdiction of courts of equity. It may be regarded as settled, however,

[1] Ferry *v.* Bank of Central New York, 15 How. Pr., 446.

[2] *In re* Colvin, 3 Md. Ch., 300. And see Crawford *v.* Ross, 39 Ga., 44. As to the removal of a receiver appointed through collusion, and to the point that the proper method of questioning such an order of removal is by appeal, and not by injunction to restrain the new receiver from interfering with the former one, see Wilson *v.* Barney, 5 Hun, 257. As to the right of the attorney-general to ask for the removal of a receiver of an insolvent corporation under the statutes of New York, and as to the practice in such cases, see Attrill *v.* Rockaway Beach Improvement Co., 25 Hun, 509. And see S. C., 25 Hun, 376. But the removal of a receiver over a corporation, upon the application of its stockholders, has been denied when it appeared that a majority of the directors were in sympathy and co-operation with such stockholders, upon the ground that the stockholders might be heard through the corporation or its directors. Fifth National Bank *v.* P. & C. S. R. Co., 1 Fed. Rep., 190.

[3] Siney *v.* New York Consolidated Stage Co., 28 How. Pr., 481; S. C., 18 Ab. Pr., 435.

that the mere fact of relationship between the receiver and the plaintiff in the action in which he was appointed, is not, of itself, sufficient ground for his removal, such relationship affording, at the most, merely a circumstance to be taken into consideration at the time of his appointment.[1] A receiver will not, therefore, be removed solely because of his relationship to the plaintiff, when no improper conduct has been shown on his part, and when he is in every way qualified for the office and has given ample security, especially when his appointment was requested by a large majority of the creditors of the fund in litigation.[2] But where the person appointed was the brother of one of the parties to the litigation, and the son of one claiming to be largely interested as a creditor, and was admitted by the plaintiff to have taken an active part in the controversy as his agent and friend, he was regarded as too far enlisted in the cause to permit of his being an unbiased and impartial receiver, and he was, therefore, removed.[3]

§ 822. It is to be observed that a court of equity will not remove its own receivers, in order to make way for agents or receivers who may be selected by private persons interested in the litigation. And when the court has appointed its receiver, who has entered upon the duties of his office, it will not remove him upon the application of another creditor of the defendant, who is entitled, under his security, to appoint an agent or receiver to collect the rents and profits of defendant's estate for the payment of such creditor.[4]

§ 823. While it has been held to be improper for the counsel of either party to the litigation to act as counsel for the receiver, yet the mere fact of the receiver having employed as his own counsel the counsel of one of the

[1] Wetter *v.* Schlieper, 7 Ab. Pr., 92; Shainwald *v.* Lewis, 8 Fed. Rep., 878.

[2] Wetter *v.* Schlieper, 7 Ab. Pr., 92.

[3] Williamson *v.* Wilson, 1 Bland, 418.

[4] Sanders *v.* Lord Lisle, Ir. Rep., 4 Eq., 43.

parties does not, of itself, unless shown to be collusive, furnish sufficient ground for his removal after he has entered upon the discharge of his duties.[1]

§ 824. It is held, in Georgia, that courts of equity are to be regarded as being always open for the purpose of removing receivers, and that the power of removal, like the power of appointment, may be exercised by the court upon due notice in vacation.[2] And since the appointment is itself a matter resting largely in the sound discretion of the court to which the application is addressed, if the court at a subsequent stage of the cause becomes satisfied that the order of appointment was improvidently made, it has undoubted power to vacate such order, thus in effect removing the receiver.[3] But before the court will entertain a motion for the removal of a receiver, due notice must be given of the motion in writing, which notice should set forth specifically the grounds upon which the removal is sought. And a failure to give such notice will warrant the court in refusing to hear the motion.[4] Nor will the rule requiring notice be relaxed, even though sufficient grounds are shown for removal, and an order of removal made without such notice will be reversed upon appeal.[5]

§ 825. Since the removal of a receiver is a matter addressed to the sound discretion of the court, its decision removing the incumbent and substituting another in his stead can not ordinarily be reviewed upon appeal to an appellate court.[6] And when, upon the final trial of the cause, judgment of nonsuit is rendered against the party on whose application the appointment was made, the court may vacate

[1] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 366.

[2] Crawford *v.* Ross, 39 Ga., 44.

[3] Copper Hill Mining Co. *v.* Spencer, 25 Cal., 11.

[4] Dougherty *v.* Jones, 37 Ga., 348; Bruns *v.* Stewart Manufacturing Co., 31 Hun, 195; Campbell *v.* Spratt, 5 N. Y. Weekly Digest, 25.

[5] Campbell *v.* Spratt, 5 N. Y. Weekly Digest, 25.

[6] Siney *v.* New York Consolidated Stage Co., 28 How. Pr., 481; S. C., 18 Ab. Pr., 435. And see Crawford *v.* Ross, 39 Ga., 44.

the order of appointment, thus removing the receiver, notwithstanding the pendency of a motion for a new trial.[1]

§ 826. The jurisdiction of a court of equity which is exercised in the removal of receivers bears a striking resemblance to that which is called into action upon the dissolution of an interlocutory injunction, and in both cases the power to terminate seems to flow naturally and as a necessary sequence from the power to create. And as an interlocutory injunction is usually dissolved upon the coming in of defendant's answer, denying under oath the allegations of the bill,[2] so in the case of a receivership, if the answer under oath fully and satisfactorily denies the equities of the bill, or the material allegations upon which the appointment was made, and these allegations are not sustained by any testimony in the case, the order of appointment will be reversed and the receiver will be removed.[3] Nor is it necessary, in all cases, to secure the removal that the equities of the bill should be entirely negatived, if it be satisfactorily made to appear to the court that there is no necessity for its intervention. And if the court is satisfied, upon the coming in of the answer, that there is no imminent danger and no pressing or urgent necessity for a receiver, it is proper to revoke the appointment.[4]

§ 827. It is competent for the court to remove one receiver, and to substitute another in his stead, by consent of all parties, when the proceedings are *bona fide*, and when there is no attempt to traffic in the receivership.[5] And

[1] Copper Hill Mining Co. *v.* Spencer, 25 Cal., 11.

[2] Hollister *v.* Barkley, 9 N. H., 230; Armstrong *v.* Sanford, 7 Minn., 49; Anderson *v.* Reed, 11 Iowa, 177; Stevens *v.* Myers, id., 183; Taylor *v.* Dickinson, 15 Iowa, 483; Hatch *v.* Daniels, 1 Halst. Ch., 14; Washer *v.* Brown, id., 81; Suffern *v.* Butler, 3 C. E. Green, 220; Parkinson *v.* Trousdale, 3 Scam., 367; Roberts *v.* Anderson, 2 Johns. Ch., 202; Harris *v.* Sangston, 4 Md. Ch., 394; Kaighn *v.* Fuller, 1 McCart., 419; Schoeffler *v.* Schwarting, 17 Wis., 30.

[3] Voshell *v.* Hynson, 26 Md., 83; Drury *v.* Roberts, 2 Md. Ch., 157.

[4] Crawford *v.* Ross, 39 Ga., 44.

[5] Farran *v.* Morris, 1 Ir. Ch., N. S., 680.

when different receivers have been appointed over the estate of a defendant, upon the application of different creditors, the hardship and expense of such a state of facts, as against the owner of the estate, will justify the court in removing all the receivers but one, and extending him over the entire estate.[1] But the removal of a receiver and the appointment of another in his stead does not have the effect of invalidating claims against the former receivership, since the management of the estate by the court is one and the same, although it becomes necessary to change the receiver.[2]

§ 828. It has elsewhere been shown, that the courts are always averse to the appointment of receivers who are in any manner interested in the cause, the office being regarded as one requiring the strictest impartiality.[3] While this is true, yet in a case where the fact of the receiver's interest, he being a stockholder and director in the plaintiff bank, was not known to the court at the time of his appointment, and he had entered upon the discharge of his duties and had spent much time in making himself familiar with the property entrusted to his charge, and no objection was shown to his fidelity or honesty, and no complaint was made of any improper discharge of his duties, or misconduct, it was held that he should not be removed immediately upon motion, but would be allowed to act until a new reference could be had to a master in chancery, to make a new appointment.[4] And it is not sufficient cause for removing a receiver of a judgment debtor, appointed in a creditor's suit, that he has employed the debtor to assist him in collecting a portion of the indebtedness assigned to the receiver, when no part of the fund has been used for the debtor's benefit, and he has had no possession of or control over the prop-

[1] Kelly *v.* Rutledge, 8 Ir. Eq., 228.

[2] *Ex parte* Brown, 15 S. C., 518.

[3] See chapter III, *ante.*

[4] Bank of Monroe *v.* Schermerhorn, Clarke Ch., 366. See, as to the power of removing receivers of insolvent banking corporations and the grounds of removal, under the statutes of Ohio, Lafayette Bank *v.* Buckingham, 12 Ohio St., 419; State *v.* Claypool, 13 Ohio St., 14.

erty after its assignment to the receiver, and when the solvency of the receiver is unquestioned and his security ample.[1]

§ 829. When a person not in interest in the controversy has fraudulently procured himself to be appointed receiver, contrary to the wishes of all parties in interest, but the appointment is reversed on appeal, thus removing him from the trust, he will be compelled to make restitution of the fund received by him to the person rightfully entitled thereto, and will not be allowed to make any deduction from the fund.[2]

§ 830. Upon a motion to vacate the order appointing a receiver, the motion being made by defendant and assented to by plaintiff, the receiver himself should not be heard in opposition, since he is not a party in interest, and has no standing in court to oppose the motion, and can not interfere in questions affecting the rights of the parties or the disposition of the property in his hands.[3]

§ 831. When defendants in the cause have agreed with plaintiffs, that upon the latter giving security in a specified amount, they may have possession and management of the property in controversy, and may nominate a receiver, defendants occupy a somewhat different attitude toward the receiver from that in the case of an ordinary appointment by the court. And in such a case, it does not lie with defendants to object to the person of the receiver and to obtain his removal, unless he commits some overt act of unfaithfulness to his trust. Nor will the court, under such circumstances, permit defendants to go into the previous acts of the receiver in his capacity as plaintiff, before his appointment as receiver, to furnish grounds for his removal.[4]

§ 831 *a*. If the removal of a receiver is sought because of informalities in his appointment, as for insufficiency of

[1] Ross *v.* Bridge, 24 How. Pr., 163; S. C., 15 Ab. Pr., 150.

[2] O'Mahoney *v.* Belmont, 62 N. Y., 133, affirming S. C., 37 N. Y. Supr. Ct. R., 223.

[3] L'Engle *v.* Florida Central R. Co., 14 Fla., 266.

[4] Cowdrey *v.* The Railroad Company, 1 Woods, 331.

the notice of the application, due diligence should be used by the parties seeking the removal. And when they delay making application for the removal for a considerable period, during which the receiver makes large expenditures in the completion of a railway over which he is appointed, they will be held to have so far acquiesced in the appointment as to be estopped from asking for the removal upon the ground of such irregularities.[1]

[1] Allen *v.* D. & W. R. Co., 3 Woods, 316.

II. Final Discharge.

§ 832. As regards the question of the final discharge of a receiver, as distinguished from his removal for cause, it may be laid down as a general proposition, that when the necessity for the office ceases to exist, the office itself must terminate and the receiver be discharged. And when a court of equity has temporarily taken possession of property by the hands of its receiver, until the proper person can be determined who is entitled to take it, the court will not

continue such possession after this necessity ceases.[1] Thus, where a receiver is appointed to take charge of the assets and property of a deceased lunatic, until it may be determined who is entitled thereto, upon the appointment of an administrator *pendente lite* by the proper court of probate jurisdiction, the receiver will be discharged and directed to turn over the assets to the administrator *pendente lite*.[2] And when a receiver has been improperly appointed over property belonging to a person not a party to the cause, the court will order the discharge of the receiver, although the cause has abated by the death of the sole defendant.[3]

§ 833. The functions of a receiver usually terminate with the termination of the litigation in which he was appointed.[4] And where the bill upon which the appointment was made is afterward dismissed upon demurrer, the duties of the receiver cease as between the parties to the action.[5] So where defendant in the action in which the receiver was appointed finally obtains judgment therein in his favor, the entry of judgment would seem to have the effect of terminating the receiver's functions, although plaintiff in the action perfects his appeal to the appellate court.[6] It is to be observed, however, that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver *ipso facto*.[7] And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership. And

[1] *In re* Colvin, 3 Md. Ch., 297.

[2] *In re* Colvin, 3 Md. Ch., 297.

[3] Lavender *v.* Lavender, Ir. Rep., 9 Eq., 593.

[4] Field *v.* Jones, 11 Ga., 413; Ireland *v.* Nichols, 40 How. Pr., 85; S. C., 9 Ab. Pr., N. S., 71; Beverley *v.* Brooke, 4 Grat., 220.

[5] Field *v.* Jones, 11 Ga., 413.

[6] Ireland *v.* Nichols, 40 How. Pr., 85; S. C., 9 Ab. Pr., N. S., 71.

[7] McCosker *v.* Brady, 1 Barb. Ch., 346; Ireland *v.* Nichols, 40 How. Pr., 85; S. C., 9 Ab. Pr., N. S., 71. See, also, Whiteside *v.* Prendergast, 2 Barb. Ch., 471.

where the bill is dismissed upon demurrer, it is the plain duty of the court to direct the receiver to restore the funds received to the person from whom they were taken.[1] But the order of discharge does not necessarily follow, in all cases, because of the determination of the suit, and the court may, upon sufficient cause shown, either discharge or continue him, according to the exigencies of the case.[2]

§ 834. Since the final decree in the cause is generally decisive of the subject-matter in controversy, and determines the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver, since there is then nothing further for him to act upon, although it would seem to be still necessary that a formal application be made for his discharge. But when the court by its decree does not attempt to decide the main question in controversy and leaves the receiver's possession undisturbed, it can not be held to have the effect of operating as a discharge, or of superseding his functions.[3]

§ 835. In general, a receiver will not be discharged until the object for which he was appointed has been fully accomplished, or until the court is satisfied that the exigency calling for a receiver has ceased.[4] For example, where, as between tenants in common of real estate, two of whom are infants, a receiver is appointed for the protection of the infants, with directions to pay over to the adults their share, he will not be discharged upon the application of one of the infants on coming of age, the other not having attained his majority. In such case, the object sought by invoking the extraordinary powers of a court of equity being the protection of the property during the infancy of both, the discharge will not be allowed until this object is fully accomplished.[5]

[1] Field *v.* Jones, 11 Ga., 413.

[2] Ireland *v.* Nichols, 40 How. Pr., 85; S. C., 9 Ab. Pr., N. S., 71.

[3] Beverley *v.* Brooke, 4 Grat., 220. But see Visage *v.* Schofield, 60 Ga., 680.

[4] Smith *v.* Lyster, 4 Beav., 227; *In re* Long Branch & Sea Shore R. Co., 9 C. E. Green, 398.

[5] Smith *v.* Lyster, 4 Beav., 227.

§ 836. It follows from the well-established doctrine that a receiver is not the agent or representative of either party to the litigation, and in no manner interested in its result, that he can not properly appeal from an order of the court discharging him from his trust and directing him to turn over the property received to another person. Being merely the officer or representative of the court, without personal interest or personal rights in the litigation, the right to discharge him rests with the court at any stage of the controversy, and from the exercise of this right he can not appeal.[1] The court will, therefore, continue to execute its order, and will compel the receiver to turn over the property as directed in the order of discharge, notwithstanding he has prayed an appeal, and has filed an appeal bond. And in case of refusal on the part of the receiver to comply with the direction in the order of discharge as to the disposition to be made of the property, the court may, if necessary, enforce obedience by attachment.[2] And because the appointment of a receiver determines no rights between the parties litigant, his possession being merely that of the court, a party to the cause can not appeal from an order discharging a receiver.[3]

§ 837. With reference to the question of the right of a defendant, against whom a receiver has been appointed, to have him discharged upon extinguishing or satisfying plaintiff's demand, there being other parties interested in having the receiver continued, a direct conflict of authority exists in the decided cases. The doctrine of the English Court of Chancery, as laid down by Lord Eldon, was, that with the right of the plaintiff to a receiver must fall the rights of all other parties to the action; and that a receiver appointed in behalf of a plaintiff should be discharged when plaintiff's right to maintain the action failed, notwithstanding other parties to the litigation might insist on their right

[1] *In re* Colvin, 3 Md. Ch., 300; Ellicott *v.* Warford, 4 Md., 80.

[2] *In re* Colvin, 3 Md. Ch., 300.

[3] Washington City & P. L. R. Co. *v.* S. M. R. Co., 55 Md., 153.

to have the receiver retained as their receiver.[1] The better doctrine, however, as deduced from the clear weight of authority and from the better legal reasoning, is directly the reverse. And since the appointment of a receiver is regarded as being made for the benefit of all parties in interest in the litigation, he will not be discharged merely upon the application of the party at whose instance he was appointed, after his demand against the defendant is satisfied, when the rights of other parties are involved. The duty of the court being to protect the rights of all parties in interest, and not merely those of the plaintiff at whose suit the extraordinary aid of the court has been invoked, it will not permit the receiver to be discharged upon the consent of the plaintiff, when it appears that the discharge may prejudice the rights of other parties to the action who do not consent thereto.[2] Thus, when a legatee under a will has filed a bill in behalf of himself and of such other creditors and legatees as may come in under the decree, to obtain satisfaction of his legacy, and has joined as a defendant an incumbrancer having a charge upon the estate, the receiver will not be discharged upon the consent of plaintiff, without the consent of such incumbrancer.[3] And in any event, a

[1] Davis *v.* Duke of Marlborough, 2 Swans., 168. This was a case where plaintiff, claiming to be an equitable creditor or incumbrancer of defendant, had obtained a receiver of the rents and profits of defendant's real estate upon which he claimed to have a charge. Defendant having paid and plaintiff received the amount claimed to be due, the receiver was discharged, notwithstanding other defendants, claiming to have annuities or incumbrances upon the same property, objected and asked to be heard against the discharge. Lord Eldon observes: "I apprehend that with the right of the plaintiff to have the receiver must fall the rights of the other parties. It would be most extraordinary if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf. My decided opinion is that the order for the receiver must be discharged, and that all falls together."

[2] Fay *v.* Erie & Kalamazoo Railroad Bank, Harring. (Mich.), 194; Bainbrigge *v.* Blair, 3 Beav., 421; Largan *v.* Bowen, 1 Sch. & Lef., 296.

[3] Largan *v.* Bowen, 1 Sch. & Lef., 296.

plaintiff who has procured the appointment of a receiver can not dismiss his bill and have the receiver discharged, without the receiver being first required to pass his accounts.[1]

§ 838. A receiver, being appointed for the interest of the parties to the action rather than his own, is not entitled to his discharge as of course upon his own application, since the court will not permit the parties to be put to the expense and inconvenience of a change simply because the receiver desires to be relieved from the trust. Where, therefore, a receiver seeks to be relieved from his duties and to have another appointed in his place, he will be required to show some reasonable cause for the application, especially when his discharge and the substitution of another person might result in inconvenience to the parties in interest and to third parties.[2] And it will not suffice to sustain such an application, that the receiver alleges his inability, because of other engagements, to properly close up the business of his receivership, since such reasons, while sufficient to excuse him from accepting the trust in the first instance, are not sufficient ground for discharging him from his obligation after it has once been accepted.[3]

§ 839. When a receiver has been appointed over mortgaged premises in an action to enforce and carry into execution the trusts of the mortgagor's will, it would seem that a mortgagee, who was not a party to the suit, is entitled to apply for the receiver's discharge. And this is regarded as the proper course for him to pursue, since he has no power to divest the receiver's possession merely by notice to the tenants of the mortgaged premises to pay their rents to him.[4]

§ 840. While the propriety of discharging a receiver, like that of appointing him, is to some extent a matter of

[1] White *v.* Lord Westmeath, 2 Hog., 33.

[2] Beers *v.* The Chelsea Bank, 4 Edw. Ch., 277; Smith *v.* Vaughan, Ca. *temp.* H., 251.

[3] Beers *v.* The Chelsea Bank, 4 Edw. Ch., 277.

[4] Thomas *v.* Brigstocke, 4 Russ., 64.

judicial discretion, yet in some cases the right to a discharge becomes an absolute right, which the court has no discretion to refuse. Thus, when a receiver of mortgaged premises is appointed and takes possession, in an action for the foreclosure of the mortgage, upon the owner of the equity of redemption offering to pay the mortgage indebtedness, or so much thereof as is due, his right to have the receiver discharged is an absolute right, the denial of which is judicial error.[1]

§ 841. In passing upon an application for a receiver's discharge, the court should have in view the interests of all parties, and if satisfied that the rights of all parties in interest will be best promoted by granting the discharge, it should be allowed. Thus, where a receiver is appointed over a corporation, under a law of the state authorizing receivers of insolvent corporations, it is proper for the court to discharge the receiver upon motion of the defendant corporation, upon being satisfied that it is in solvent circumstances and able to resume business, and that the interests of the creditors will be best secured by this course.[2]

§ 842. Where, upon a creditor's bill filed against a judgment debtor and a mortgagee to whom he had mortgaged his personal property, in trust for the payment of various debts, an injunction is granted and a receiver appointed, upon allegations in the bill that the debtor is in possession of the property and converting the proceeds of sales to his own use, the bill also alleging the debtor's insolvency and consequent danger of plaintiff losing his debt, if these charges are expressly and fully denied by the answer, the court should dissolve the injunction and discharge the receiver.[3]

§ 843. The negligence and delay of a plaintiff, at whose instance a receiver has been appointed, may be sufficient ground for discharging the receiver. Thus, where the

[1] Milwaukee & Minnesota R. Co. *v.* Soutter, 2 Wal., 510; S. C., Woolworth's C. C., 49.

[2] Ferry *v.* Bank of Central New York, 15 How. Pr., 445.

[3] Furlong *v.* Edwards, 3 Md., 99.

plaintiff, after moving for the appointment of a receiver of his debtor's property, consents that the proceedings may lie dormant, and takes no further steps therein for a period of over a year, and until another creditor has procured the appointment of a receiver, the court will not allow the one thus appointed upon the subsequent application to be displaced, but will discharge the other.[1]

§ 844. The putting a purchaser into possession of lands held by the receiver in a cause, and sold under the final decree, is equivalent *ipso facto* to a discharge of the receiver, and is sufficient ground for vacating his recognizance.[2]

§ 845. A receiver appointed in a cause, having filed his petition in bankruptcy and compromised with his creditors, which compromise was approved by the court, it was ordered that he be discharged from his receivership and pass his final accounts.[3]

§ 846. A defendant in the action in which a receiver has been appointed has the undoubted right to move for his discharge *pendente lite*, and upon such motion the court will not enter upon the question whether the order of appointment was originally opposed by the defendant at the time it was made.[4] Under the English practice, the receiver, although served with the petition for his discharge, need not appear upon the hearing of the petition, since he is merely the officer of the court. Nor can he be allowed his costs when he has appeared upon such application.[5] But while it is regarded as the proper practice to notify all parties in interest of an application for the discharge of a receiver, the fact that he has been discharged without such

[1] National Mechanics Banking Association *v.* Mariposa Co., 60 Barb., 423.

[2] Anonymous, 2 Ir. Eq., 416; Ponsonby *v.* Ponsonby, 1 Hog., 321.

[3] Ellard *v.* Cooper, 17 Ir. Ch., N. S., 151.

[4] Grenfell *v.* Dean and Canons of Windsor, 2 Beav., 544.

[5] Herman *v.* Dunbar, 23 Beav., 312. And see generally as to the English practice upon applications to discharge receivers and vacate their recognizances, Lawson *v.* Ricketts, 11 Beav., 627.

notice to the defendants in the cause may be treated as a mere irregularity which will not justify a reversal of the order upon appeal.[1]

§ 847. It is held, in Michigan, that an order discharging a receiver and providing for passing his accounts, for canceling his bond, and for paying into court any surplus in his hands, and for restoring the property of which he had taken possession as receiver, is not such a final order as is appealable under the laws of the state.[2]

§ 848. As regards the effect of the discharge of a receiver upon liabilities incurred by him during his receivership, it is held that the discharge does not constitute a bar to bringing any action against him on account of such matters, when the liability incurred is sufficient to create a right of action. For example, when a receiver has taken possession of property belonging to third persons, and has sold it under and by virtue of his receivership, and after notice of the rights claimed by such persons, the court will permit them to bring an action, notwithstanding his discharge, especially when they were not notified of the application for his discharge.[3]

[1] Coburn *v.* Ames, 57 Cal., 201.

[2] Colgate *v.* Michigan Lake Shore R. Co., 28 Mich., 288.

[3] Miller *v.* Loeb, 64 Barb., 454.

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